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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 619

HELEN CALHOUN CASH,

Appellant,

vs.

THE METROPOLITAN TRUST COMPANY, CONSERVATOR, A CORPORATION, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

STATEMENT OF JURISDICTIONAL FACTS.

Pursuant to Rule 12, paragraph 1, of the Rules of the Supreme Court of the United States, Helen Calhoun Cash, appellant, presents the following statement, particularly discussing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to review the decree of the Supreme Court of the State of Illinois appealed from herein.

A.

The Statutory Provision Believed to Sustain the Jurisdiction.

The basis of this appeal is Section 237, paragraph A of the Judicial Code (28 U. S. C. A. Section 344), the material parts of which provide:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

B.

The Illinois Statutes Which Are Involved.

Appellant contends that she was arbitrarily deprived of the protection afforded her by, "An Act to revise the law in relation to the commitment and detention of lunatics and to provide for the appointment and removal of conservators, and to repeal certain acts therein named," as amended. Approved June 21, 1893 (Laws of 1893, Illinois Revised Statutes, 1937, Chapter 85, paragraphs 1 to 14).

This Act is commonly called the Lunacy Act and the relevant parts are here summarized. Section 1 defines the word "lunacy". Section 2 forbids the detention of persons alleged to be insane unless they have been legally adjudged to be insane as provided in this Act, except for a period of ten days, pending judicial investigation of the patient's mental condition.

Section 3 provides for the initiation of the proceeding by filing a statement of lunacy with the clerk of the county

court in which the patient "resides or is found" and prescribes the contents of the statement.

Section 4 requires that, unless the patient is brought before the court without a writ, a writ shall issue to bring him in. The patient is required *to be brought before the court,* unless an affidavit is filed by a credible person stating that the accused is unable by reason of his physical or mental condition to appear before the court. If such an affidavit is filed the judge of the court may make the writ returnable at some other time and place. No such affidavit was filed herein. This section further provides, "and in no case shall such hearing take place until the person alleged to be insane shall have been notified as the court shall direct."

Section 5 provides that inquests in lunacy shall be by jury or a commission of two licensed physicians engaged in active practice.

Section 6 provides that if no jury is demanded, the judge may appoint a commission, which is directed to file its report with the clerk of the court. However, section 6 must be read in connection with section 8, as amended in 1903, to enumerate where inquests may be held, and expressly forbids commissions to hold hearings out of court.

Section 7 provides that the procedure in lunacy inquests shall conform as nearly as may be to the ordinary practice of the county court, and gives the accused the rights of a defendant in a civil suit.

Section 8 further provides that inquests in lunacy may be held in open court, in chambers, or at the home of the accused at the discretion of the court. The judge shall preside, whether or not the inquest is by jury or by commission and the presence of the patient shall be indispensable. The judge may require all persons other than the patient, his friends, witnesses, licensed attorneys and offi-

cers of the court to withdraw from the room during the inquest.

Section 12 vests jurisdiction over lunatics in the county Court.

Appellant did not contend that the above Act was unconstitutional, until the arbitrary and capricious construction was placed upon it in this case by the Illinois Supreme Court. The present decision makes the statute unconstitutional by depriving appellant of due process of law and of the equal protection of the laws as we pointed out at our first opportunity in our petition for rehearing.

Appellant appealed from the Circuit Court to the Appellate Court, because of the State Supreme Court's rule that it has no jurisdiction of direct appeals which challenge only the correctness of decrees entered by lower courts, viz, judicial error. (*Merlo* v. *Public Service Co. of Northern Illinois,* 381 Ill. 300; *People* v. *Totten,* 378 Ill. 385; *Blue Bird Air Service* v. *Chicago,* 376 Ill. 272; *Kuzminski* v. *Waser,* 374 Ill. 428; *Kellogg* v. *Kellogg,* 371 Ill. 241; *Genslinger* v. *New Illinois Athletic Club,* 332 Ill. 316; *Cooper* v. *Palais Royal Theatre Co.,* 320 Ill. 44.) The above is said to forestall any suggestions by appellee that appellant waived the constitutional questions of due process of law by appealing to the Appellate Court. We have conformed to the local practice, and moreover, the Federal question did not assume primary importance until the Supreme Court adopted its opinion on May 20, 1943, arbitrarily construing the Act as not requiring a court proceeding in lunacy inquests, contrary to its previous decision in *Haines* v. *Cearlock,* 184 Ill. 96, which had been the law in Illinois since 1900.

C.

The Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Is Presented.

The final judgment sought to be reviewed was entered and spread of record on September 15, 1943, when appellant's Petition for Rehearing was denied.

The petition for appeal herein was presented on November 10th, 1943, to the Chief Justice of the Supreme Court of Illinois and denied. The application was presented to Mr. Justice Murphy on December 14th, 1943.

Statement Showing the Nature of the Case, Rulings of the Court and Cases Believed to Sustain the Jurisdiction.

1. *Nature of the Case.*

On September 1, 1938, appellant filed a petition in the county court of Kane County, Illinois, seeking to have vacated an order entered May 23, 1938 in a lunacy proceeding against her. Appellant charged that she had been brought into Kane County from Cook County by fraud, misrepresentation, threats, trickery, and duress, and that the county court had been imposed upon. This petition was dismissed after hearing, and appellant appealed to the Circuit Court of Kane County (Record page 39). The cause was heard *de novo* and judgment was entered for appellee. Upon appeal to the Appellate Court of Illinois for the Second District, the judgment was reversed *pro forma* for failure of appellee to file briefs. When the cause was redocketed, appellant was given leave to file an amended complaint. Appellant alleged that she was not found within the County of Kane within the meaning of the Lunacy Act, and set forth the facts showing how she had been brought

there. She further alleged that the County Judge of Kane County and the Assistant State's Attorney of Kane County appeared at the Resthaven Sanitarium accompanied by two doctors, and asked appellant many questions. Appellant alleged that she was not advised and was not aware that a court proceeding was being held, and was not asked if she wanted counsel or trial by jury. She alleged that there was no clerk, sheriff or bailiff present and charged that no court had convened, that the statute had not been followed, that because of the lack of jurisdiction the proceeding was in violation of the Constitution of the United States and the Constitution of Illinois concerning due process of law (Record page 80). The State's Attorney of Kane County filed an answer admitting that appellant was not a resident of Kane County, and averred that she was a resident either of Cook County, Illinois, or of the State of Florida or Texas, but averred that the place of residence was immaterial so long as appellant was physically found within the boundaries of Kane County. The answer admitted that appellant was brought to Resthaven Sanitarium in Elgin, Illinois, by her sister and other physicians and nurses. The answer denied any fraud, trickery or duress. It admitted that on May 23, 1938 an "inquisition" was conducted by the County Judge of Kane County with two physicians and respondent present (Record page 94). This is an admission of appellant's allegation that no clerk, sheriff or bailiff was present and, therefore, that court was not regularly convened.

Appellee, Metropolitan Trust Company, as conservator of appellant, intervened on May 17, 1940 after having been granted leave by the Probate Court of Cook County to employ counsel to defend against appellant's petition in the Circuit Court of Kane County (Record 114). From this point on appellant has been financing both sides of this

litigation, inasmuch as her own conservator wrongfully appears against her. (*Mathews* v. *Sargent*, 175 Ill. App. 289).

The Circuit Judge held the case under advisement from May, 1940 until June 5, 1941 and then entered an order dismissing the amended petition. Appellant appealed to the Appellate Court which affirmed the judgment. The State Supreme Court granted leave to appeal, but finally affirmed the judgment, after first adopting an unanimous opinion reversing the judgment on November 17, 1942.

2. *The Facts.*

Appellant, a graduate of the University of Illinois, is the widow of Gentry Cash, who was a first vice-president of the Standard Oil Company of Indiana. Appellant and her husband, who had a Ph. D. degree in chemistry from Johns Hopkins University, worked together in their own workshop and laboratory (Record 217). At the time of the acts complained of she owned a home in Flossmoor, Illinois, that cost over $70,000.00 when it was built. She also had personal property stored in Texas. She omitted her sister, Doctor Horner, her closest relative, from her will when it was drawn in 1934.

Appellant claimed Cook County, Illinois, as her residence (Record 185). She had lived in Texas at intervals between 1932 to 1936, when she returned to the Broadview Hotel in Chicago. Her home in Flossmoor was rented at the time. She went to Florida in October, 1937 and stayed until April 27, 1938, when she came back to Chicago. There is evidence to show that she was declared insane in Florida and was put in jail. Her sister, Dr. Horner, was notified and came to Florida. Appellant returned to Chicago with her sister on May 3, 1938, and stopped at the Stevens Hotel. Appellant's family physician, a Dr. Forester, was called

in, and a nurse, Gladys Preston, was employed. A Dr. Low also examined appellant and inquired of Miss Preston as to her conduct. The nurse replied that appellant had done nothing out of the way.

On May 4, 1938, Dr. Horner and the nurse took appellant to the Parkway Sanitarium and put her into a dirty, filthy room. Appellant objected and sent the nurse for the superintendent. About an hour later Doctor Low called and discharged the nurse from the case (Record 222).

On May 5, 1938, Dr. Horner called and told appellant they were going to take her to a private hospital. Appellant objected that she did not need to be taken any place. They went downstairs and met a Mr. McConnell, who later was appointed conservator, but has since resigned. Two automobiles containing nurses and doctors from Resthaven Sanitarium drove up to the entrance of the Sanitarium and Mrs. Cash got into the car, and was driven to Resthaven Sanitarium in Elgin, Illinois, and locked in the ward for violent patients. Frank Nash, who was an undergraduate nurse when Mrs. Cash was brought to Resthaven testified that appellant read a lot and was quiet and did not bother any one (Record 126) and was not violent. Mrs. Cash told him she could not understand why she was in the institution.

Appellant was kept locked in this asylum until May 23, 1938, when she was taken by attendants to a dental office in Elgin where she had a tooth extracted under an anesthetic. This is proof that she was able to attend a hearing in the court house. That afternoon, while she was still nervous and upset over the extraction, the county judge, Assistant State's Attorney, and two doctors called on her informally at Resthaven and asked her quesctions. She was not advised that she was attending a lunacy inquest, nor that she had a right to counsel and a jury trial. After

this visit the order in question was entered declaring appellant to be insane. She remained in Resthaven and was unable to communicate with her friends for several months. Finally, she obtained counsel who immediately filed a petition to have the order voided.

Appellant has never deemed that the question of whether or not she was sane or insane was of any moment. The State Supreme Court erroneously stated that it never was contended that appellant was not insane. We certainly do deny that she was insane, but we have sought to keep the issues as simple as possible. If appellant were insane the case is only aggravated. She was even more incapable of demanding counsel and a jury trial and the notice claimed to have been given was utterly futile.

3. *Rulings of the Court.*

The case of *Haines* v. *Cearlock*, 184 Ill. 96 was a leading case in Illinois construing the Lunacy Act of 1893 until the decision here appealed from was made. The court in the majority opinion does not distinguish it, and only mentions it in connection with the procedural point as to appellant having a right to appeal. Otherwise it is ignored. The dissenting opinion which contains an exhaustive study of the applicable Illinois law is premised on *Haines* v. *Cearlock*. The dissenting justice points out in detail the flagrant abuses that are tolerated by the majority opinion, emphasizing in particular the ordinary strictness of construction that is applied to statutory proceedings in Illinois. The dissenting opinion bears eloquent testimony of the lengths to which the court went to uphold the judgment of the lower courts.

The decision appealed from is contrary to the policy of the court, as announced in re *Estate of Rackliffe* (1937), 366 Ill. 22, 28, against "short-cut" proceedings where the

rights and liberty of a citizen are involved. This was but a pithy characterization of well-settled doctrine in Illinois.

It is difficult to realize that *Haines* v. *Cearlock, supra,* was written by the same court that reached the decision here appealed from. While no court is compelled to adhere to erroneous decisions, the court does not say that the earlier decision was erroneous. The controlling decision is ignored. The following language from *Haines* v. *Cearlock* is particularly applicable to this case (page 96):

> "The record contains no notice or summons to Nancy M. Haines, and shows no trial or inquest by the court as to whether or not she was of sound mind and capable of managing her own estate, or as to the truth of the allegations of the petition. So far as appears from the record the court merely appointed these two physicians to decide as to the truth of the petition, and upon their report that they found the statements of the petition to be true the judgment was entered. The necessity of a notice to the party to be deprived of property or liberty in such a proceeding was declared in *Eddy* v. *People,* 15 Ill. 386. In that case the court, speaking upon that subject said: 'If he be in fact a lunatic the notice would be undoubtedly useless; but that is the very question to be tried, and until a regular trial is had or inquest made the presumption is in favor of his sanity. The consequences resulting from the determination are of the most momentous character to the lunatic, both personally and pecuniarily, and so long as it is possible that a sane person might, upon an *ex parte* examination, be found to be insane, every principle of justice and right requires that he should have notice and be allowed to make manifest his sanity, and to refute or explain the evidence tending to prove the reverse. The idea is too monstrous to be tolerated for a moment, that the legislature ever intended to establish a rule by which secret proceedings might be instituted against any member of the community, by any party who might be interested, to shut him up in

a madhouse, by which he might be divested of his property and his liberty without an opportunity of a struggle on his part. Should such a principle be sustained, the most sane man in the State is liable to be surprised at any moment by finding himself bereft of his property and on his way to a lunatic asylum. Such justice as this would be worthy of that dread tribunal the *holy vehme,* whose first notice to its victim was the execution of its sentence, but it cannot be tolerated where just and equal laws prevail and can be enforced. If the party be actually lunatic the notice can do no harm; but if he be sane it is of the most momentous importance to him, and, at any rate, it must be his legal right."

Appellant contends that the above quotation is the only sound construction that can be placed upon the Lunacy Act of 1893, as amended, and that she is entitled to have it so construed. There is not one syllable in the Act which supports the arbitrary conclusion announced by the court that the county judge is appointed a commissioner of the Legislature to hear testimony and then report it into court and adopt his own conclusions of fact. Such a statement was adopted solely to uphold what was done in this case. The appellees never argued for such construction. Section 12 of the Act plainly vests jurisdiction in the county court, prescribes notice, limits jurisdiction to persons residing or found in the county, provides for the right to counsel and a jury trial, provides that the procedure shall be the same as in civil cases, makes the presence of the accused indispensable, and forbids the judge to exclude the court officials, the patient, her counsel and friends.

If the court means to say that the judge was taking depositions when he interviewed appellant at Resthaven and then went back to the courthouse and convened court and entered the order declaring appellant to be insane, then clearly appellant has been deprived of due process of law.

First, no notice that depositions were to be taken was given as is required in civil cases. Second, the patient was admittedly never present at the courthouse in Kane County, and the Act says that her presence is indispensable. She was not present when she was declared to be insane.

Appellant suggests that it is proper to point out further misstatements of the record to demonstrate the arbitrary failure of the highest court of the state to consider the case as made.

(a) The court says appellant was found within the county, because she was there voluntarily. This is contrary to appellee's theory of the case, when it averred in its answer that her physical presence was all that was required under the Lunacy Act. The State Supreme Court could not go that far, but held that a voluntary presence in the County was necessary. It then proceeded to find that appellant had gone there voluntarily, although she did not know where she was going when she entered the automobile belonging to Resthaven and manned by doctors and nurses and escorted by another sanitarium automobile. The dissenting judge, who wrote the majority opinion on the first consideration of the cause, found that appellant had not gone to Kane County voluntarily. This indicates there was substance in our contention.

(b) The State Supreme Court found that appellant's contention that she was not properly found to be insane because no court was properly convened, to be unanswerable. It admitted that a court was essential; that it had to be convened and that the presence of a clerk and sheriff are indispensable to the exercise of judicial power. Since the Lunacy Act vests jurisdiction in the County Courts of the state, it followed that one had to be convened.

In order to eliminate this contention, the court held that appellant had contended that she could overcome the record

by oral evidence and show that no court was actually convened. Appellant never made any such contention, first because appellee admitted that the hearing was held by the county judge and two doctors and no clerk or sheriff was present. No proof was necessary. The oral proof did show that no clerk or sheriff were present. When appellant filed a motion on September 9, 1943 while petition for rehearing was pending, calling the court's attention to the fact that the placita showing the convening of court had been placed in the transcript by the county clerk in preparing the transcript of the record, without having an order or minute of a convening order in the record, the court refused to recede from its untenable position and exercise its power under its rule 50 to amend the record. However, the record showed on its face that the County Court was not convened for the inquest since the fact was admitted in appellee's answer. The motion to have the offending placita removed from the record was not essential, but would have removed the last doubt about the question being open for review.

The court then adopted its arbitrary construction of the Lunacy Act as not requiring the court to be convened when the evidence was taken, but only when the order was entered, overlooking that the accused was not present at that time, as required by the Lunacy Act.

4. *Cases Believed to Sustain Jurisdiction.*

Appellant contends that the United States Supreme Court has jurisdiction of this cause, because a Federal question is presented. It is her contention that the administration of the Lunacy Act of 1893, as amended, as justified by the highest court of Illinois deprives her of her rights under the Fourteenth Amendment to the Federal Constitution. *Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 479, 480; 60 L. Ed. 392, 394.

Appellant was not given a hearing into the question of her sanity as provided by the Lunacy Act of 1893, as amended, and the State Supreme Court condoned the procedure used by adopting an arbitrary construction of that Act, which was not contended for by the parties hereto, and, therefore, its decision violated due process of law. Such proceeding is challengeable by appeal to the United States Supreme Court. *Brown* v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682; *Lambert* v. *Central Bank*, 85 F. (2d) 954; Certiorari denied, 300 U. S. 658.

Appellant was not tried before a judicial tribunal as is required by due process of law. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158.

Appellant contends that the decision of the highest state court construing the Lunacy Act of 1893 was an arbitrary and capricious exercise of power in conflict with the fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. Of such action this court has jurisdiction. *American Railway Express Co.* v. *Kentucky*, 273 U. S. 259, 71 L. Ed. 639; *Booth* v. *Illinois*, 184 U. S. 425, 46 L. Ed. 623.

While the distinction between mere error and gross and obvious error, which amounts to arbitrary action, is too subtle to be catalogued, appellant contends that the facts of this case indicate arbitrary action over which this court has jurisdiction. *Roberts* v. *New York*, 295 U. S. 264, 278; 79 L. Ed. 1429, 1436.

E.

Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial.

Appellant's contention that the administration of the Illinois Lunacy Act of 1893, as justified by the highest

court of the State of Illinois, deprives her of due process of law and to the equal protection of the laws under the Fourteenth Amendment, presents a Federal question. (*Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 479, 480; 60 L. Ed. 392, 394.) Appellant was not given a hearing into the question of her sanity as provided by the statute in question and the State Supreme Court condoned the procedure used by adopting an arbitrary construction of the Lunacy Act, which was not contended for by the parties hereto, and, therefore, its decision violated due process of law. (*Brown* v. *Mississippi,* 297 U. S. 278, 80 L. Ed. 682; *Lambert* v. *Central Bank,* 85 F. (2d) 954; certiorari denied, 300 U. S. 658.) This court has never decided that the State's power over the person and property of lunatics is plenary and that lunatics are not entitled to due process of law. Such persons are as helpless and are entitled to the protection of the Fourteenth Amendment fully as much as criminals who are convicted without following the forms of law. The State officials, both executive and judicial, had no power to disregard the provisions of the Lunacy Act, and so the questions presented are necessarily substantial.

F.

Questions of Federal Jurisdiction Were Raised in the State Courts.

Appellant challenged the jurisdiction of the County Court to enter the order of commitment of May 23, 1938 on the grounds that she was not found within the County of Kane within the meaning of the Lunacy Act and that a court had not been convened according to law to hear the lunacy inquest. It was charged that the order deprived her of due process of law (R. 80). The applicable clause of the Constitution of the United States need not be pleaded. (*Furman* v. *Nichol,* 75 U. S. 44, 57.) The sole purpose

of her petition was to assert that appellant had been deprived of her liberty without any semblance of compliance with the Lunacy Act.

Under the Illinois practice, a direct appeal to the Supreme Court would not lie, because only judicial error was involved. (*Genslinger* v. *New Illinois Athletic Club*, 332 Ill. 316; *Cooper* v. *Palais Royal Theatre Co.*, 320 Ill. 44.) The judgment was affirmed, and the Illinois Supreme Court granted leave to appeal. After leave to appeal was granted, the Circuit Judge who heard the cause on appeal from the County Court of Kane County, was elected to the State Supreme Court. He is noted as having taken no part in the decision of this case. The State Supreme Court first adopted an opinion by Mr. Justice Smith reversing the judgment. This opinion was unanimous. Appellee's petition for rehearing was allowed two terms later and an opinion was adopted, Mr. Justice Smith dissenting at length, affirming the judgments appealed from. Both opinions are appended to this jurisdictional statement. In the last opinion, the court said:

> "The power and control over the person of lunatics is controlled by the Lunacy Act. The State had delegated, by statute, its special commission to the county judge to hold inquisitions into sanity. If a jury trial is demanded, the court must give the party such a trial. If the court is of the opinion that a hearing should be had by a commission of physicians, he may appoint them. When the judge acts in the capacity of a court, the court must be legally constituted. But when he is merely holding a hearing with a commission of physicians he is not attending so much in his character as judge as by virtue of a statutory duty for taking evidence, upon which his judicial authority is subsequently exercised when the commission's report and finding is filed, at which time he may enter an order in accordance with the finding of the commission or he may set aside the finding and dismiss the proceedings

and may enter such order as he deems proper for the disposition of the person alleged to be insane. (Ill. Rev. Stat. 1941, Ch. 85, Pars. 10 and 11.) At the time of entering the order, the court must be legally convened, as that is the time he exercises his judicial functions."

Appellant in her petition for rehearing urged at page 11 that the construction of the Lunacy Act adopted by the last opinion deprived her of due process of law under the Fourteenth Amendment to the United States Constitution. She urged:

"The present opinion adopts a new and novel construction of the Lunacy Act which has not been advocated heretofore by either of the parties, and is contrary to former decisions of this court. We suggest it deprives appellant of due process of law in that it deprives her of a hearing before a court of law. The construction placed upon the Lunacy Act is so arbitrary and strained that it deprives appellant of the equal protection of the law under the Fourteenth Amendment to the Federal Constitution."

G.

The Non-Federal Ground of the State Court's Decision Is Without Any Fair or Substantial Support and Cannot Defeat This Court's Jurisdiction.

The State Supreme Court stated in its opinion:

"It is argued that the order of the county court was void because the oral proof shows that there was no sheriff, bailiff or clerk present at the hearing. This court has held that a sheriff and clerk are essential to a court in order for it to exercise judicial powers. (*Witter* v. *Cook County Comrs.*, 256 Ill. 616.) • • • The record in this case shows, by the convening order, that the sheriff, State's Attorney and clerk were present when the order was entered. The record, in that

respect, imports verity and cannot be impeached by oral testimony. *People* v. *DeLisle*, 374 Ill. 437.)"

The speciousness of this point is easily demonstrated. Appellant never once contended that she had to rely on oral proof to contradict the record. She contended that the record showed on its face that no court was convened, because appellee admitted in its answer that court was not regularly convened, thus raising no issue of fact on that question. (Record 94. Petition for leave to appeal, which stood as appellant's brief in the Supreme Court, pages 12, 13; Reply Brief, pages 6-9.) The Supreme Court permitted a placita which was made up later by the clerk of the County Court in preparing the transcript to overcome the admitted facts appearing in the record. It did this to foreclose appellant's challenge of the fatal defect in the record resulting from the fact that appellant was not tried before a court as she was entitled under the Lunacy Act.

To point out the obvious error in the opinion appellant moved the court on September 9, 1943 to exercise its power under its rule 50 to expunge the placita from the record, or in the alternative to summon the county clerk to show by what right he had included such placita in the transcript of the record. This motion was accompanied by the affidavit of two of appellant's counsel in which they stated that the county clerk had admitted to them that he kept no records of the convening of court and had nothing on which to base the placita, and was corroborated by counsel's examination of the records which he did keep. Appellees filed counter-suggestions in which they did not deny that the placita had no place in the record. The Supreme Court refused to exercise its power to correct this injustice and denied appellant's motion.

Appellant, therefore, contends that the record shows on its face that the County Court was not convened to hear

the inquest into her sanity and that the Supreme Court has seized upon this non-Federal ground in order to deprive this court of jurisdiction, a thing it cannot do. *C. B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 50 L. Ed. 596; *West Chicago Street R. Co.* v. *Illinois*, 201 U. S. 506, 50 L. Ed. 845, 850; *Ward* v. *Love County*, 253 U. S. 17, 64 L. Ed. 751; *Union Pacific R. Co.* v. *Public Service Com.*, 248 U. S. 67, 63 L. Ed. 131.

Respectfully submitted,

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APPENDIX "A".

Second Opinion.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS,
Supreme Court, ss:

At a Supreme Court, begun and held in Springfield, on Monday, the 10th day of May in the year of our Lord, one thousand nine hundred and forty-three within and for the State of Illinois.

Present: Clyde E. Stone, Chief Justice; Justice Francis S. Wilson, Justice Loren E. Murphy, Justice William J. Fulton, Justice Walter T. Gunn, Justice June C. Smith, Justice Charles H. Thompson; George F. Barrett, Attorney General; Warren C. Murray, Marshal.

Attest: Edward F. Cullinane, Clerk pro tempore.

Be it remembered, that afterwards, to-wit, on the 20th day of May, 1943 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 26738.

HELEN CALHOUN CASH, *Appellant,*

vs.

METROPOLITAN TRUST COMPANY, Conservator, *Appellee.*

Appeal from Appellate Court, Second District.

EDWARD F. CULLINANE, Clerk of Supreme Court, State of Illinois.

Docket No. 26738—Agenda 37—March, 1943.

In re Helen Calhoun Cash, Appellant.—(Metropolitan Trust Company, Conservator, et al., Appellees).

MR. JUSTICE THOMPSON delivered the opinion of the Court:

Appellant, Helen Calhoun Cash, prosecutes this appeal to reverse a judgment of the Appellate Court for the Second District, which affirmed a judgment of the circuit court of

Kane county dismissing her petition to vacate an order of the county court of that county, adjudging her insane. The petition for inquisition was filed in the county court of Kane county, May 19, 1938. Notice was served on appellant on May 21, and on May 23 a hearing by a commission of physicians appointed by the county judge, at which the judge and appellant were present, was held in the Resthaven Sanitarium. Upon the report and findings of the commission being filed, the court, regularly convened, entered an order adjudging appellant to be insane. No appeal was taken from that order and it is not contended that appellant is not now or was not then insane.

On September 1, 1938, on appellant's behalf, a petition was filed in the county court to set aside the adjudication of insanity on the ground that the entire proceedings were void because appellant was shown to be a resident of Cook county and had been removed to Kane county by fraud and duress, and that she was not "found" in Kane county within the meaning of that word as used in the Lunacy Act. (Ill. Rev. Stat. 1941, chap. 85, par. 3.) The county court dismissed the petition. On appeal to the circuit court a trial de novo was had and the petition was again dismissed. From that order an appeal was taken to the Appellate Court for the Second District, which court, for failure of appellee to file briefs, reversed the case pro forma and remanded the cause to the circuit court. When the cause was redocketed in the circuit court, an amended petition was filed on appellant's behalf which was also denied. An appeal to the Appellate Court resulted in an affirmance of that order and leave to appeal to this court was granted.

It is alleged in the amended petition in substance; (a) that at the time of the commencement of the action, appellant was, and from thenceforth has been, a resident of Cook County and at no time was she "found in Kane county" within the meaning of the statute; (b) that on the night of May 3, she was confined to and held a prisoner in a room at the Stevens Hotel in Chicago, by her sister and a nurse; (c) that on the afternoon of May 4, she was removed from the Stevens Hotel and taken by her sister and a nurse to Parkway Sanitarium in Chicago and there locked in a room

with a nurse present preventing and restraining her from communicating with friends and attorneys as she desired and that she was kept a prisoner there that night; (d) that on May 5, she was removed from the Parkway Sanitarium by her sister and others and taken to Resthaven Sanitarium against her wishes; (e) that upon arriving there she was locked in a room and held a prisoner against her wishes and was not permitted to communicate with her friends and attorneys until long after May 23, 1938; (f) that she was brought into Kane County by fraud, misrepresentation, trickery, threats and duress; (g) that there was no sheriff, bailiff or clerk present at the hearing, and that she was not advised and was not aware that a court proceeding was being held and that she was not asked if she desired counsel or a trial by a jury; (h) that a fraud was perpetrated on the court by the signing of the petition by Veronica Kelley because there is no such person and; (i) that all the persons named in the lunacy petition by whom the facts could be proved, are connected with the Resthaven Sanitarium, except Doctor Nerancy.

The prayer of the petition, as amended, was that all the orders entered in the cause be expunged for lack of jurisdiction and because entered without due process of law. An answer denying the material averments of the amended petition, with a reply thereto, tendered the issues of fact on which appellant, to succeed, must sustain the burden of proof.

A motion to dismiss the appeal has been taken with the case. In support of the motion, suggestions are submitted that no appeal is allowed under the Lunacy Act other than from the county court to the Circuit Court and that since the statute specifically provides for an appeal to, and a trial de novo in, the circuit court it amounts to an implied denial of any other right or method of review except by habeas corpus as provided in section 24 of the Lunacy Act. Suggestions in opposition to the motion to dismiss raise the points that the Lunacy Act does not specifically deny the right of appeal which has been recognized both by this court and by the Appellate Court, and that an appeal is authorized by section 77 of the Civil Practice Act and section 122 of the act in relation to county courts.

Under the Lunacy Act of 1874 no provision was included for any appeal from an order adjudging insanity, and this court held in *People ex rel. Fullerton v. Gilbert,* 115 Ill. 59, that no appeal from such an order would lie. The argument that section 122 of the act in relation to county courts was applicable to such proceedings was expressly rejected.

Section 7 of the present Lunacy Act, which was pressed in 1893, (Ill. Rev. Stat. 1941, chap. 85, par. 7,) provides that the rights of the person whose mental condition is inquired into shall be the same as those of any defendant in a civil suit, and while this is a petition to set aside the order of the county court on the ground that appellant was fraudulently taken into Kane county, it is germane to the issue of Lunacy, and the rights of the defendant, the appellant here, are directly affected, Section 7 provides that the rights of the person whose mental condition is inquired into shall be the same as those of any defendant in a civil suit, and section 11 of the act as it existed when this petition was filed, and which controls in this case, specifically provided that "appeals shall be allowed to the circuit court from any order or judgment made or rendered under this act." (Ill. Rev. Stat. 1937, chap. 85, par. 11.) If we are to give any meaning at all to the language of section 7, it must mean that the general laws in regard to the rights of defendants are to be applicable to proceedings under the Lunacy Act. Under such construction the appellant here would have the right of appeal from the final order or judgment of the circuit court as provided by the Civil Practice Act. Ill. Rev. Stat. 1941, chap. 110, par. 201.

In *Neely vs. Shepherd,* 190 Ill. 637, this court assumed jurisdiction to review an Appellate Court judgment rendered in an appeal from a judgment of the circuit court entered after a trial de novo in an appeal from the county court.

In *Haines v. Cearlock,* 184 Ill. 96, this court took jurisdiction on a writ of error to review an order of the county court entered in an insanity inquest, but the writ was dismissed. This court did not, however, notice or discuss the right of review. We are of the opinion, therefore, that under section 11 of the Lunacy Act as it existed at the time

the petition was filed and under section 7 of such act, and section 77 of the Civil Practice Act, the Appellate Court and this court, on appeal, have jurisdiction to review judgments of trial courts in proceedings under the Lunacy Act, and that appellees' motion must be denied.

The first question on the merits with which we are faced is whether the order assailed is void because the county court of Kane county had no jurisdiction. No question is raised as to the jurisdiction of the subject matter. The law confers jurisdiction on county courts to hear and determine questions presented in lunacy inquisitions. The controversy hinges on what is the proper venue in such cases as this. Diligent search has failed to supply any decisive case. Resort must be had, therefore, to general principles, taking into consideration any conditions detained in this record.

Appellant contends, and there is considerable evidence to support, that she is a resident of Cook County, although there is abundant proof that she was still a resident of Texas. She was considered, in the petition upon which the inquiry into her sanity was based, as residing in Cook County. The proof shows that she had resided in Texas and in Chicago and was in Florida shortly before she was brought to the Stevens Hotel in Chicago. That she was in jail in Florida and was aided by Miss Keeler, a friend from Whiting, Indiana, and by her sister, a doctor of Albany, New York, is uncontradicted. Both made the trip to Florida to assist her because she was in difficulty. It is not denied that she was declared insane by the probate court in Florida.

The record conclusively shows that appellant was given notice of the hearing two days prior to May 23. It is as conclusively established that she was physically present in Kane county when notified and she was present at the inquisition. No one doubts her physical presence in the county on May 19, when the petition for the inquiry was filed.

Where a person claimed to be insane is actually found and duly served with notice in a county, he is properly "found," within the county, within the meaning of the

statute, unless he was there by reason of some fraud or duress on the part of someone in order to obtain service or confer jurisdiction in that county. That rule has been applied under statutes using the words, "may be found." *Willard v. Zehr*, supra; *McNab v. Bennett*, 66 Ill. 157.

It is quite true that courts will not tolerate an abuse of process by which a party is brought within the jurisdiction of the court through some fraud or duress for the purpose of obtaining service or of conferring jurisdiction in a particular county. The cases of *McNab v. Bennett*, supra, and *Wanzer v. Bright*, 52 Ill. 35, are relied upon by appellant as rendering this rule applicable in support of the argument that appellant was not "found" in Kane county. An examination of those cases discloses that the question was presented under totally different aspects from that which appears in the record before us.

The record in the instant case is destitute of proof that appellant was confined and held prisoner in a room in the Stevens Hotel on the night of May 3, 1938, by her sister and a nurse. She testified on both direct and cross-examination, after which the court interrogated her. She testified that she built a home in Texas, moved a great deal of her furniture there, voted in that State, and intended when she went there, to make her home in the Rio Grande Valley. She considered herself a resident of Texas, was made president of a landowner's association and expected to make that her permanent residence. Some of her goods were still in Texas, at the time of the hearing. She testified she returned to the Broadview Hotel in Chicago the latter part of 1936, to re-establish her residence in Cook county, but left there for Florida in the latter part of 1937. She had been in Florida since December, 1937, when she encountered her difficulty. When Miss Keeler and her sister, Doctor Horner, came to Florida to assist her in her trouble, she made up her mind absolutely to return to Illinois because the doctors said she had to have medical attention and she said she was coming back to get the care she needed. She testified that she came back to Illinois voluntarily. She had no trouble with her sister or Miss Keeler. When she arrived in Chicago she went voluntarily to the Stevens

Hotel because it was centrally located, and registered under her own name. She and her sister called Doctor Low, with whom appellant was acquainted, and the services of Gladys Preston, a nurse, were obtained. Appellant called the First National Bank about honoring a check she was going to cash at the hotel. She remained at the Stevens one night in charge of the nurse. From the testimony of the nurse it appears that nothing was said about taking appellant to Grant Hospital, as claimed by appellant. When they left the Stevens the nurse knew they were going to the Parkway Sanitarium. Appellant was dissatisfied with the room at the Parkway Sanitarium and her sister expressed a similar impression of the room, since Doctor Horner lived in Albany the natural inference is that Doctor Low recommended the Parkway. Seeing her sister in distress, Doctor Horner, the evidence shows, arranged for her to be taken the next day to Resthaven Sanitarium, in every respect a highly desirable institution for the care and treatment of mental patients. There is no evidence of any force being used, nor of any deception practiced by anyone to get her into Kane county. There is no evidence, presumption or inference that anyone had any purpose or motive, in taking her there, to submit her to the jurisdiction of the county court of Kane county other than for her own welfare.

There is no proof of any wrongful detention for more than ten days without an adjudication of insanity. Appellant made no effort to leave the Stevens Hotel, the Parkway Sanitarium or Resthaven. While she testified that she was unable to communicate with her attorney, there is no proof of anyone interfering with her liberty in contacting friends or her attorney. If she had felt aggrieved at being detained, she was entitled to a hearing for her release by a habeas corpus proceeding. The proof fails to show any state of facts comparable to the circumstances in the case of *Crawford v. Brown,* 321 Ill. 305, where the woman who was placed in an asylum was not proved to be insane or dangerous to herself or others. In that case the doctor and nurse forcibly administered morphine so that the woman could be taken to the institution against her will. It is apparent, in the instant case, that efforts were being

made for the welfare of appellant and that the proof fails to establish the charges of fraud or duress in bringing appellant into Kane County. The record further discloses timely notice given by the State's Attorney on the order of the court, the presence of Appellant at the hearing and the presence of the judge.

It is argued that the order of the county court was void because the oral proof shows that there was no sheriff, bailiff or clerk present at the hearing. This court has held that a sheriff and clerk are essential to a court in order for it to exercise judicial powers. (Witter *v.* Cook County Comrs. 256 Ill. 616.) The Judge, however, exercises the judicial power with such assistants as he may lawfully have to aid him. The Lunacy Act authorized the judge to appoint a commission of physicians, who, in his presence, conduct the inquisition, make and file with the clerk their report and findings as to the respondent's sanity, and upon that report the judge pronounces his judicial order and the clerk enters it of record. The record in this case shows, by the convening order, that the sheriff, State's Attorney and clerk were present when the order was entered. The record, in that respect, imports verity and cannot be impeached by oral testimony. *People v. DeLisle*, 374 Ill. 437.

The power and control over the person of lunatics is controlled by the Lunacy Act. The State had delegated, by statute, its special commission to the county judge to hold inquisitions into sanity. If a jury trial is demanded, the court must give the party such a trial. If the court is of the opinion that a hearing should be had by a commission of physicians, he may appoint them. When the judge acts in the capacity of a court, the court must be legally constituted. But when he is merely holding a hearing with a commission of physicians he is not attending so much in his character as judge as by virtue of a statutory duty for taking evidence, upon which his judicial authority is subsequently exercised when the commission's report and finding is filed, at which time he may enter an order in accordance with the finding of the commission or he may set aside the finding of the commission or he may set aside the finding and dismiss the proceedings and may enter such order

as he deems proper for the disposition of the person alleged to be insane. (Ill. Rev. Stat. 1941, chap. 85, Pars. 10 and 11) at the time of entering the order, the court must be legally convened, as that is the time he exercises his judicial functions. The record conclusively shows by the convening order that the court was duly constituted at that time, with the sheriff, State's attorney and clerk present.

The final point argued is that the hearing was improperly held at Resthaven Sanitarium, in the absence of an affidavit showing appellant's inability to attend court. This contention deserves no serious consideration. That point was not raised either in the county or circuit court and questions not raised below are not subject to review. The county judge exercised his statutory authority to fix a time and place for the hearing and he issued his warrant for the production of the person at that time and place.

The record is free from prejudicial error and the judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

Mr. Justice Fulton took no part in the consideration or decision of this case.

Mr. Justice Smith dissenting:

Section 4 of the Lunacy Act (Ill. Rev. Stat. 1941, chap. 85, par. 4) after providing for the issuance of a writ commanding the person who has custody of the person alleged to be insane to produce such person before the court, further provides that "in no case shall such hearing take place until the person alleged to be insane shall have been notified *as the court shall direct.*"

In *Haines* v. *Cearlock*, 184 Ill. 96, it was said: "The necessity of a notice to the party to be deprived of property or liberty in such a proceeding was declared in *Eddy* v. *People*, 15 Ill. 386. In that case, the court, speaking upon that subject, said: 'If he be in fact a lunatic the notice would be undoubtedly useless; but that is the very question to be tried, and until a regular trial is had or inquest made the presumption is in favor of his sanity. The consequences resulting from the determination are of the most momen-

tous character to the lunatic, both personally and pecuniarily, and so long as it is possible that a sane person might, upon an ex parte examination, be found to be insane, every principal of justice and right requires that he should have notice and be allowed to make manifest his sanity, and to refute or explain the evidence tending to prove the reverse. The idea is too monstrous to be tolerated for a moment, that the legislature ever intended to establish a rule by which secret proceedings might be instituted against any member of the community, by any party who might be interested, to shut him up in a madhouse, by which he might be divested of his property and his liberty without an opportunity of a struggle on his part. Should such a principle be sustained, the most sane man in the State is liable to be surprised at any moment by finding himself bereft of his property and on his way to a lunatic asylum. Such justice as this would be worthy of that dread tribunal the holy vehme, whose first notice to its victim was the execution of its sentence, but it cannot be tolerated where just and equal laws prevail and can be enforced. If the party be actually lunatic the notice can do no harm; but if he be sane it is of the most momentous importance to him, and, at any rate, it must be his legal right'." It should be noted that the statute, as it existed at the time the case of *Eddy* v. *People, supra,* arose, contained no express provision for notice to the person alleged to be insane. (Rev. Stat. 1845, chap 50, sec. I.) In 1893 and prior to the decision in *Haines* v. *Cearlock, supra,* the statute was amended so as to provide for such notice. This statute, as amended in 1893, is section 4 of the Lunacy Act, as it now exists.

With reference to the character of the notice to be given to the person alleged to be insane, it was further observed in *Haines* v. *Cearlock, supra:* "Regarding notice, the statute provides that in no case shall a hearing take place until the person alleged to have been insane shall be notified *as the court shall direct.* The character of notice is left to the sound discretion of the court * * *."

In Behrensmeyer v. *Kreitz,* 135 Ill. 591, this court also quoted with approval from *Eddy* v. *People, supra,* as follows: "In Eddy v. The People, 15 Ill. 386, and long prior

to the adoption of any statute requiring notice to the supposed insane person in a proceeding *de lunatico inquirendo*, it was held by this court that reasonable notice to such person was necessary, and even in a case when the supposed insane person actually appeared by counsel and examined the witnesses. Section 2, chapter 86, of the Revised Statutes, provides that in a proceeding to ascertain whether a person be lunatic or distracted, 'summons shall be issued and served upon the person for whom a conservator is sought to be appointed, in the same manner as summons is issued and served in cases in chancery.' Most important rights, both personal and pecuniary, of the person against whom such application is made, are involved in the investigation, and the word 'shall,' in the statute, must be regarded as mandatory. In this case the record shows only nine days' service of summons before the date of hearing and judgment, and that the service was by reading. Under the statute, service was required to be made by delivering a copy of the summons, and at least ten days before the hearing. (Rev. Stat. chap. 22, sec. II.) There was no waiver of irregularities by Weisenberger on account of his personal appearance in the proceeding, for an insane man is incompetent to waive any right, and the appellant here can not afford to admit that he was not insane. The finding and adjudication, and appointment of a conservator, were void for want of jurisdiction, and the court properly excluded them as evidence."

In *Eddy* v. *People, supra*, it was shown that the person alleged to be insane actually had notice and appeared at the hearing by his counsel and participated in the examination of witnesses. It was argued that this was sufficient. In disposing of this contention the court said: "It is said in this case, that the supposed lunatic did have notice, and actually appeared by counsel and examined the witnesses, and that we should presume notice was given till the contrary is shown, upon the principle that we will presume the court below proceeded regularly. If notice was given the record should show it affirmatively. How is it possible upon this writ of error for the plaintiff to show the negative and prove that he had no notice? This case must be

tried by the record, and neither party can introduce other evidence to contradict, explain, or enlarge it. The record should have shown the notice. But this is not a case of first impression. The case of *Chase* v. *Hathaway* is analogous to this in every essential particular, and is precisely in point. The court there said, 'there being no provision in the statute for notice to the party who is said to be incompetent, by reason of insanity, to manage his estate, it seems that the judge of the probate did not think such notice essential to his proceedings. But we are of opinion that, notwithstanding the silence of the statute, no decree of a probate court so materially affecting the rights of property and the person, can be valid unless the party to be affected has had an opportunity to be heard in his defense'." For the reason that the record did not show that notice was given, it was held the court below was without jurisdiction and its adjudication a nullity.

Section 4 of the Lunacy Act, as amended in 1893, does not provide the character of notice to be given to the person alleged to be insane. It provides, however, that such person shall be notified "as the court shall direct." Where the statute provides that the court shall fix the notice to be given, it is indispensable that an order be entered fixing such notice. A notice given without such previous order of the court, fixing the kind and character of the notice to be given is a nullity, and does not confer jurisdiction on the court.

In *Reizer* v. *Mertz*, 223 Ill. 555, the court construed an identical provision with reference to notice in the Administration Act. It was there said: "Section 112 of the administration Act provides that the heirs of the decedent shall be notified of the intended final settlement before its approval, 'in such manner as the court may direct,'—that is, the court may direct that the notice of final settlement be actual or constructive; and, regardless of what the law may be where the heirs have actual notice of the presentation of the final report of an administrator or executor and application for discharge, clearly, if the notice is constructive, the court must fix the character of notice to be given the heirs before the notice is given. Here it is apparent the court took no action with reference to the notice pro-

vided by the statute to be given the heirs before the notice of the intended final settlement and application for discharge of the executor was given. The notice relied upon was given in October and the report was not filed until November. The fixing by the court of the manner in which the notice of final settlement and application for discharge is to be given, where the notice is constructive, is jurisdictional, and no constructive notice can be given to a non-resident heir of final settlement and application for discharge which will be binding upon him, unless the court has fixed the manner of giving notice, by an order entered of record, prior to the time such notice is given."

Under the above authorities, if there is no order of the court directing the kind or character of the notice to be given, the court is wholly without jurisdiction to proceed with the hearing. As said in the case of *Haines* v. *Cearlock, supra,* such notice is indispensable to the jurisdiction of the court to proceed with such hearing. The lack of such notice could not be waived, or the giving of such notice dispensed with by the personal appearance of Helen Calhoun Cash in the proceeding. She was incompetent to waive any right. *Behrensmeyer* v. *Kreitz, supra.*

There is contained in the record in this case a transcript of the proceedings in the county court. This transcript discloses that on May 19, 1938, a petition was filed alleging that Helen Calhoun Cash was insane or suffering under mental derangement and unsafe to be at large. This petition was signed by Veronica Kelley, an employee of Resthaven Sanitarium. It was sworn to before Minnie Goll, a notary public of Kane county, Illinois. She was also an employee of Resthaven Sanitarium. No affidavit was filed showing that the physical or mental condition of Helen Calhoun Cash was such as to prevent her attendance in court, as provided in said section 4. On the contrary, there was endorsed in the back of the petition what purports to be an order of the county judge for the issuance of a writ of detention, directed to Libby Goll. Such writ was issued. It commanded Libby Goll to produce Helen Calhoun Cash before the court at the time fixed for the hearing. There is also endorsed on the back of the petition, over the signature of the county judge, what purports to be an order

setting a hearing for May 23, 1938, at 10:00 o'clock A. M., at the Resthaven Sanitarium, and appoint two physicians as commissioners. Entirely separate and wholly disconnected from any other written or printed words either on the face or back of the petition, the words, "Give respondent at least 24 hours notice of hearing," appear. These words are not addressed to anyone, nor does it appear by whom they were endorsed on the petition. They do not purport to be over the signature or name of the county judge, or to be an order entered by him. They are wholly separated from the purported orders above referred to. The name or signature of the county judge does not appear in connection with these words. The statute directs that the notice shall be fixed by the "court," not by the "judge."

To whom the word "respondent," in the endorsement refers, nowhere appears. There is no one connected with either the petition or the proceedings, except Libby Goll, who could be properly identified as "respondent." No one is named or referred to in the record as respondent. There is nothing in the record from which anyone could be identified as "respondent," except Libby Goll. The only writ ordered to issue was to be directed to her. She was the "respondent" to be named in the writ. Clearly the reference to twenty-four hours notice is to Libby Goll, the respondent, named in the only writ ordered to issue. These words, even if they were contained in an order of the court properly entered, would be wholly insufficient as fixing the kind and character of the notice to be given to Helen Calhoun Cash, as required by section 4 of the Lunacy Act. They are not contained in what purports to be an order of the county court, or even an order or direction of the county judge. They do not purport to direct or even indicate by whom notice shall be given.

Even if this endorsement was made by the county judge, it fell far short of an order of the county court required by statute as to the character of notice to be given to the person alleged to be insane. Jurisdiction to enter order required by statute is vested in the courts and not in the judges. (Department of Public Works *v.* Legg, 374 Ill. 306.) The judge has no power to make orders unless such power is specially conferred upon him by statute. (Ling

v. King & Co. 91 Ill. 571.) A judge can not act judicially as a court in the absence of special statutory authority. (Conkling *v.* Ridgely & Co. 112 Ill. 36; Durham *v.* Brown, 24 id. 94.) It is well settled that judges can exercise no judicial functions except such as they are specifically authorized to do by statute. (Devine *v.* People, 100 Ill. 290.) The entry of an order as required by section 4 of the Lunacy Act, fixing the notice to be given to a person alleged to be insane, is an important judicial function, which can only be exercised by the court. The judge may order the issuance of a writ commanding the person having the custody of the person alleged to be insane to produce such person before the court for the hearing. Section 4 of the Lunacy Act expressly authorized the judge to do this. But the statute specifically provides that notice to such person of the hearing shall be such "as the *court* shall direct." Clearly, the legislature used the word "court" in the last clause of section 4, advisedly and not as meaning the judge of the county court. By section 13 of the Lunacy Act (Ill. Rev. Stat. 1941, chap. 85, par. 13) jurisdiction over insane persons, who are not charged with crime, is vested solely in the county courts.

The notice required by section 4 is in effect the process of the court. It must emanate from the court for the purpose of enabling the court to acquire jurisdiction of the person alleged to be insane. It is the same character of notice as that required by the former statute to be given to a minor in proceedings by his guardian to sell his real estate. Such notice constitutes the process of the court by which jurisdiction is acquired. (Nichols *v.* Mitchell, 70 Ill. 258.) When the statute requires a notice to be given of the pendency of proceedings in a court, the notice given must be authentic. It is an essential quality of such notice that it be given by competent authority, and this must appear from the notice itself. If it shows on its face that it is the act of one having no authority, it is ineffectual to give the court jurisdiction. (36 Am. Jur., p. 237, sec. 9.) Here the applicable statute requires notice to be given under the order and direction of the court. To be effective, it must be ordered by the court. It must emanate from the court.

It must be issued under the authority of the court. It must be served by like authority. The only way a court can give authenticity to its notices and process, is by certification under the hand of the clerk and the seal of the court.

The notice relied upon in this case is as follows:

"To Helen Calhoun Cash.

"You are hereby notified that on Monday, the 23rd day of May, A. D. 1938, at the Resthaven Sanitarium, Elgin, in the said County of Kane, at the hour of 2:00 o'clock in the after noon, or as soon thereafter as counsel may be heard, before the Honorable Olney C. Allen, County Judge, proceedings will be instituted and a hearing had to inquire into the question of your alleged insanity, when and where you may appear and defend if you see fit so to do.

Charles A. O'Connor, State's Attorney."

Endorsed on the back of this notice is a return showing that it was served on Helen Calhoun Cash on May 21, 1938. The return is signed, "Wm. T. Kruse, Constable."

The record does not disclose, and no claim is made, that any other notice was given to Helen Calhoun Cash. There was no order of the county court directing the character of notice to be given or the manner in which it should be given. It will also be noted that the order of the county judge endorsed on the back of the petition set the matter for hearing at the Resthaven Sanitarium for May 23, 1938, at the hour of *10:00 o'clock A. M.* The notice signed by the State's Attorney and addressed to Helen Calhoun Cash recites that the hearing is to be held at *2:00 o'clock P. M.* on that day.

Obviously, the notice relied upon is nothing more than a letter written and signed by the State's Attorney. It does not purport to have been authorized or issued by the court. It did not emanate from the court. It is not signed by anyone authorized to act for the court or to issue notices or process of the court. It is, in no sense, official. So far as its authenticity is concerned, it might as well have been

signed by any other county officer or individual, or by no one at all. It is not such a notice as the statute requires.

In the absence of a special order to the contrary, the clerk is the only person authorized by statute to issue notices ordered to issue by the court. Such notices to be given authenticity, must be issued and tested by him, under the seal of the court. No one could seriously contend that the words found on the back of the petition, even if contained in an order properly entered by the court, would authorize the State's Attorney to issue such notice, or a constable to serve it. The signature of the State's Attorney gave it no authenticity. In the absence of a special order of the court directing a notice or process to be served by an individual, the sheriff is the only officer authorized by statute to make such service. (Ill. Rev. Stat. 1941, chap. 110, par. 130; Ill. Rev. Stat. 1941, chap. 125, par. 15.)

The only proof of service of the notice on Helen Calhoun Cash is the return of the constable endorsed thereon. A constable is not an officer of the county court. His service of process or notice issued by the county court is not in his official capacity as constable. As constable he has no authority to serve such process. He could only be authorized to make such service as an individual, upon special order of the court, authorizing him to do so, not as constable, but as an individual. The notice was not addressed to him—it was addressed to Helen Calhoun Cash. Officers are only authorized to make return of service of process where the statute authorizes them to make such service. (Vennum *v.* Vennum, 56 Ill. 430; Ball *v.* Peck, 43 id. 482.) Where a court is exercising a special statutory jurisdiction, as in this case, jurisdiction is never presumed, and if it does not appear from the record, the judgment will be void. *Fico v. Industrial Com.* 353 Ill 74; *Brown v.* VanKeuren, 340 id. 118; Vyverberg *v.* Vyverberg, 310 id. 599; *Spring Creek Drainage Dist. v. Highway Comrs.* 238 id. 521.

Service of such notice as the county court shall direct is jurisdictional. Lawful evidence that such service has been made must be preserved in the record, otherwise the court is without jurisdiction. (Drainage Dist. *v.* Highway Comrs.

supra; Vyverberg *v.* Vyverberg, supra; Fico *v.* Industrial Com. supra.) In this case the record fails to show that any lawful notice was ever issued or served on Helen Calhoun Cash, as required by statute. There is no sufficient proof of service of any notice. Jurisdiction in special statutory proceedings is never presumed. It must affirmatively appear from the record. (Ashlock *v.* Ashlock, 360 Ill. 115; Keal *v.* Rhydderck, 317 id. 231.) Nothing will be presumed in favor or jurisdiction in the face of facts appearing in the record showing that it did not exist. (Sharp *v.* Sharp, 333 Ill. 267.) A recital of jurisdictional facts in the judgment is not sufficient where the lack of jurisdiction appears from the record. *People ex rel. Vaughan v. Sargent*, 252 Ill. 104.

Where the record itself shows the evidence upon which the court acted in finding that it had jurisdiction, no presumption of jurisdiction can be indulged, and where the record shows the evidence upon which the court acted is insufficient, the finding in favor of jurisdiction is not conclusive. The presumption of jurisdiction applies only when the record is silent upon the question. *Sharp v. Sharp*, supra; *Osgood v. Blackmore*, 59 Ill. 261; *Clark v. Thompson*, 47 id. 25.

Originally, in England, the custody and control of lunatics was vested in the King, who had authority to initiate an inquest as to the sanity of the subject. Later this authority was delegated to the Lord Chancellor as representative of the Crown. The Lord Chancellor, however, in exercising this authority, was not acting as Chancellor, but was exercising a very limited authority or jurisdiction conferred by special grant from the *King*. *People v. Janssen*, 263, Ill. App. 101.

The courts of England never had jurisdiction over insane persons or their property. There was no proceeding known to the laws of England by which the courts could exercise such jurisdiction. In this country, the State, in its character as parens patriae, may lawfully exercise the same powers and control over the persons and property of lunatics and idiots that was exercised by the Crown of England through the Lord Chancellor. *Dodge v. Cole*, 97 Ill. 338.

That power in this State is exercised by the county courts by virtue of a special statutory jurisdiction conferred upon them. There was no proceeding known to the common law in England, in the courts, even comparable to the statutory powers conferred upon our county courts relative to the persons and property of those alleged to be insane. That a proceeding of this character in this State is a special statutory proceeding is clearly recognized and so treated in the following cases: *People ex re. Fullerton v. Gilbert*, 115 Ill. 59; *McCormick v. Blaine*, 345 id. 461, and many other cases.

In the exercise of special powers conferred by statute, as distinguished from the exercise of jurisdiction according to the course of the common law, a court of general jurisdiction does not differ from a court of limited and special jurisdiction. In such proceedings, nothing will be presumed to be within the jurisdiction where the jurisdiction does not distinctly appear from the record. (Cobe *v.* Guyer, 237 Ill. 516; Watts *v.* Dull, 184 id. 86; Payson *v.* People ex rel. Parsons, 175 id. 267; Chicago and Northwestern Railway Co. *v.* Galt, 133 id. 657; Munroe *v.* People, 102 id 406.) In such cases, jurisdiction is never presumed, and if it does not appear, the judgment will be void. Whatever the rank of the court exercising a special statutory jurisdiction, it is governed by the same rules as courts of limited jurisdiction. Every fact necessary to put the court in motion and give jurisdiction must be in conformity with the statute granting the right. *Brown v. VanKeuren, supra.*

As I view it, the record clearly shows that Helen Calhoun Cash was not "found" in Kane county, within the meaning of that term as used in the Lunacy Act. This court has said that a person is "found" in a county so that process can be served upon him, only when he has voluntarily gone into the county, or has been properly seized for a crime and taken into the county, in which case the law presumes he is voluntarily within the county. (Willard *v.* Zehr, 215, Ill. 148; McNab *v.* Bennett, 66 id. 157.) In my opinion the evidence in this case is conclusive that Helen Calhoun Cash was taken into Kane county without her consent, forcibly and against her will, and there unlawfully detained for

more than ten days prior to the time the inquest was held, and that she was not "found" within Kane county.

For the above reasons, I am unable to concur in the majority opinion.

APPENDIX "B".

STATE OF ILLINOIS,
Supreme Court, ss:

First Opinion Filed on the 17th Day of November, 1942.

No. 26738.

CASH, *Appellant,*

vs.

GOLL, Superintendent, etc., et al., *Appellees.*

Appeal, Appellate Court, Second District.

Docket No. 26738—Agenda 40—May, 1942.

Helen Calhoun Cash, Appellant, *v.* Libby Goll, Superintendent—(Metropolitan Trust Company, et al., Appellees).

MR. JUSTICE SMITH delivered the opinion of the court:

This case originated in a proceeding under the Lunacy Act. (Ill. Rev. Stat. 1941, chap. 85.) On May 19, 1938, a petition was filed in the county court of Kane county alleging that Helen Calhoun Cash was insane and asking for an adjudication of that fact. A hearing on the petition was held at Resthaven sanitarium, near Elgin, on May 23, 1938. The record shows that two physicians and the county judge were present at the hearing. These physicians were appointed by the judge as a commission under the statute. Mrs. Cash was found to be insane and ordered committed to the Resthaven sanitarium. Thereafter, on September 1, 1938, a petition on behalf of Mrs. Cash was filed in the

county court attacking the jurisdiction of the court and the validity of the proceedings. The basis of this attack was that Mrs. Cash was a resident of Cook county and had been forcibly removed into Kane county, and hence was not "found" in Kane county within the meaning of that word, as used in the Lunacy Act. Upon a hearing, the county court dismissed the petition. An appeal was taken to the circuit court, where, on a trial *de novo*, the petition was again dismissed. From that order an appeal was taken to the Appellate Court for the Second District. That court reversed the judgment of the circuit court *pro forma* for failure of appellees to file briefs, and remanded the cause to the circuit court. When the cause was redocketed in the circuit court Mrs. Cash filed an amended petition which the court denied. An appeal from the order dismissing the amended petition was taken to the Appellate Court, where the order was affirmed. We granted leave to appeal from the judgment of the Appellate Court.

Appellees have filed a motion in this court to dismiss the appeal. In support of the motion it is argued that under the Lunacy Act the only appeal allowed is from the county court to the circuit court; that no other appeal is allowed under the statute. The motion to dismiss the appeal was taken with the case. It is further contended that the Lunacy Act, having specifically provided for an appeal to, and a trial *de novo* in, the circuit court, this amounts to a denial of any other right or method of review. While the Lunacy Act is not cited or referred to in the motion, apparently the reference is to section 11 of the act of 1893, which provided that "Appeals shall be allowed to the circuit court from any order or judgment made or rendered under this act." Ill. Rev. Stat. 1937, chap. 85, par. 11.

In opposition to the motion, appellant contends that section 122 of the act relating to courts (Ill. Rev. Stat. 1941, chap. 37, par. 294) gives the right of appeal from county courts to circuit courts, and that the right of appeal from final orders of the circuit court is allowed in all cases by section 77 of the Civil Practice Act. (Ill. Rev. Stat. 1941, chap. 110, par. 201.) It is urged that there is nothing in the Lunacy Act that denies the right of appeal from final orders

of the circuit court in cases arising under that act and that the right of appeal from such orders is given by the other statutes above referred to.

A review of the history of appeals under the last two Lunacy Acts will be instructive on this point. In the Lunacy Act of 1874, no provision of any kind was made for an appeal from the order of the county court adjudging a person insane. Under this act it was held, in *People ex rel. Fullerton*, v. *Gilbert*, 115 Ill. 59, that no appeal would lie from such an adjudication. In that opinion the argument that section 122 of the act relating to courts was applicable to proceedings under the Lunacy Act, was expressly rejected.

In 1893 the present Lunacy Act was passed. Section 7 of that act (Ill. Rev. Stat. 1941, chap. 85, par. 7) provides that "the rights of the person whose mental condition is inquired into shall be the same as those of any defendant in a civil suit." Section 11 provided specifically that "Appeals shall be allowed to the circuit court from any order or judgment made or rendered under this act." It was held in *Neely* v. *Shephard*, 190 Ill. 637, that the party alleged to be insane in a hearing under the Lunacy Act was entitled to a trial *de novo* in the circuit court upon appeal, and, inferentially, that in such cases an appeal would lie to the Appellate Court. In that case this court considered an appeal from the Appellate Court and in the case of *Haines* v. *Cearlock*, 184 Ill. 96, which was also under the 1893 act, reviewed the judgment of the county court on writ of error, without noticing or discussing any question of jurisdiction or right of review.

As the law now stands, the defendant in a lunacy proceeding is, by section 7 of the Lunacy Act, given the same rights "as those of any defendant in a civil suit." No similar language was contained in the act of 1874. (Ill. Rev. Stat. 1874, chap. 85.) The decision in *People* v. *Gilbert, supra*, may be distinguished for that reason. When that case was decided there was no statute giving such person the rights now given him by section 7. If the language of section 7 is to be given any meaning at all, it must mean that the general laws in regard to the rights of defendants, are to be applicable to proceedings under the Lunacy Act. These

rights include the right to a trial *de novo* in the circuit court, as allowed by the act relating to courts, (Ill. Rev. Stat. 1941, chap. 37, par. 294,) and the right of appeal from a final order or judgment of the circuit court, granted by the Civil Practice Act. (Ill. Rev. Stat. 1941, chap. 110, par. 201.) We are of the opinion, therefore, that the Appellate Court, and this court, have jurisdiction to review the judgments of trial courts in proceedings under the Lunacy Act, on appeal, and that appellees' motion must be denied.

On the merits of the case appellant contends that the entire lunacy proceedings were void, and that the order adjudging her insane should be set aside. This contention is based on three propositions: (1) that appellant was not "found" within the county, and the county court therefore had no jurisdiction; (2) that the order of adjudication was entered by an individual, not by the county court; and (3) that the county judge had no power to conduct the hearing at the sanitarium in the absence of a showing by affidavit that appellant was unable to attend a hearing at the court house.

As to the first proposition, appellant asserts that she is a resident of Cook county; that on the evening of May 4, 1938, she was removed from a room at the Stevens Hotel in Chicago and taken to the Parkway sanitarium, in Chicago, by her sister and a nurse; that she was held a prisoner in the Parkway sanitarium that night, and on the following day was removed, against her will, to Resthaven sanitarium near Elgin by her sister and a physician; that upon her arrival at the sanitarium she was confined in a room and held a prisoner; that she was given no notice of the proposed hearing as to her sanity until it was actually held, and that she did not know it was a court proceeding, and was given no opportunity to contact anyone or procure counsel. The evidence in the record supports this contention.

Appellees, on the other hand, while admitting that Mrs. Cash was detained under this supervision, say that she was mentally unbalanced and unable to care for herself; that her detention, first in the Parkway and then in the Resthaven sanitarium, was for her own good; that a petition for

commitment was filed on May 19, 1938, and Mrs. Cash received notice of the hearing on May 21, 1938, two days before it was actually held; and that the county court had jurisdiction to hear the cause and enter the order even though Mrs. Cash had been brought into Kane county and there detained against her will.

The various steps whereby a person may be adjudged insane by a commission in the county court are set out in detail in the Lunacy Act. The act first defines insanity. It then specifically states that no one who has not been legally adjudged insane shall be restrained of his liberty, except that temporary detention, not to exceed ten days, may be permitted pending a judicial investigation of the alleged lunatic's mental condition. The act provides the following procedure in determining the question of the alleged insanity of the patient. First, a sworn petition, signed by a reputable citizen of the county in which the patient resides or is found, must be filed. The petition must set forth that the person named is insane and that the welfare of himself or others requires his restraint or commitment to a hospital or asylum. The petition must be accompanied by the names of witnesses, including at least one physician, by whom the truth of its allegations may be proved. Second, unless the alleged insane person is brought before the court without a writ, or unless an affidavit is filed setting forth that the condition of the person is such as to render it improper that such person be brought before the court, the judge must order a writ to be issued, commanding the attendance of such person at a time and place fixed by the court. No hearing may be held without notice to the person alleged to be insane. Third, if no jury is demanded, the judge may appoint a commission of two qualified physicians to make a personal examination of the patient and file with the clerk a verified report of their findings, conclusions and recommendations. Fourth, the judge may hold the inquest in open court, in chambers or at the home of the patient, but he must, in all cases, preside at the inquest. Fifth, the commission must answer such interrogatories as may be contained on the form prescribed by the State Commissioners of Public Charities. Sixth, the court must cause the

finding of the commission to be recorded. He must then enter an order for the disposition of the person alleged to be insane, either discharging him, remanding him to the custody of his friends, or committing him to some hospital or asylum.

It is conceded that Mrs. Cash was not a resident of Kane county, and that if she was not "found" in that county, within the meaning of that word as used in the Lunacy Act, the court had no jurisdiction. It is also clear from the evidence that she was forcibly brought into the county and detained in Resthaven sanitarium from May 5, 1938, to May 19, 1938, before the petition was filed, and without her consent.

No cases are cited in the briefs of either appellant or appellees, in which the question of the interpretation of the word "found" in the Lunacy Act has been before the court. In connection with other statutes, however, we have said that a party was "found" in a county so that process could be served upon him only when he had voluntarily gone into that county, or had been properly seized for a crime and taken into that county. (*Willard* v. *Zehr*, 215 Ill. 148; *McNab* v. *Bennett*, 66 id. 157.) Appellees contend that Mrs. Cash was lawfully detained by them under the provisions of section 2 of the Lunacy Act. But conceding that her initial detention was lawful, the act specifically provides that the temporary detention shall only be for ten days. Appellees here waited more than ten days before filing their petition to have Mrs. Cash adjudged insane. The original rightful temporary detention had become unlawful before the jurisdiction of the county court was invoked. It would be manifestly unjust to give to individuals the right to deny another liberty for unlimited periods of time. (*Crawford* v. *Brown*, 321 Ill. 305.) We are of the opinion that the appellant here cannot be said to have been "found" within the county of Kane on May 19, 1938, so as to give the county court jurisdiction to adjudicate the question of her sanity.

As to the character of the hearing conducted, it appears from the record that no affidavit was filed showing that Mrs. Cash was unable to attend court; that she was not vio-

lent, and was permitted to go down town in Elgin in the company of an attendant; that she had visited a dentist's office in Elgin on the day of the hearing and shortly before the time the hearing was held. Mrs. Cash, whom the commissioners found by their report had a "good memory," testified that she had no notice of the hearing, was given no chance to contact friends or counsel, or to demand a jury, and was not even apprised of the fact that it was a judicial hearing. The commissioners' report is very short. After finding that Mrs. Cash's memory was good, it states that she is a manic depressive type. The whole proceeding appears to have been marked with an informality not in keeping with the gravity of the hearing or the express requirements of the statute.

In *Haines* v. *Cearlock, supra,* and in *Eddy* v. *People ex rel. Eddy,* 15 Ill. 386, the court condemned the failure to follow the statute and give notice of the hearing to the party alleged to be insane. The purpose of the law, as demonstrated by its provisions, is to give the alleged lunatic a fair and impartial hearing, as well as to protect society from the consequences of his lunacy. To this end it is required that he be given notice, have an opportunity to be represented by counsel and be tried by a jury, if a jury be demanded. He can only be confined after an impartial adjudication of his sanity. We cannot approve informalities which ignore the express requirements of the Lunacy Act in conducting such hearings.

For the reasons set out the county court had no jurisdiction. All proceedings had in that court and in the circuit and Appellate courts on appeal were a nullity. The amended petition to dismiss the proceedings for want of jurisdiction should have been sustained. The judgments of the Appellate and circuit courts are reversed.

Judgements reversed.

Mr. Justice Fulton took no part in consideration or decision of this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 619

HELEN CALHOUN CASH,

Appellant,

vs.

THE METROPOLITAN TRUST COMPANY, CONSERVATOR, A CORPORATION; PEOPLE OF THE STATE OF ILLINOIS,

Appellees.

APPEAL FROM SUPREME COURT OF ILLINOIS No. 26738.

BRIEF IN OPPOSITION TO MOTION OF APPELLEES TO DISMISS OR AFFIRM.

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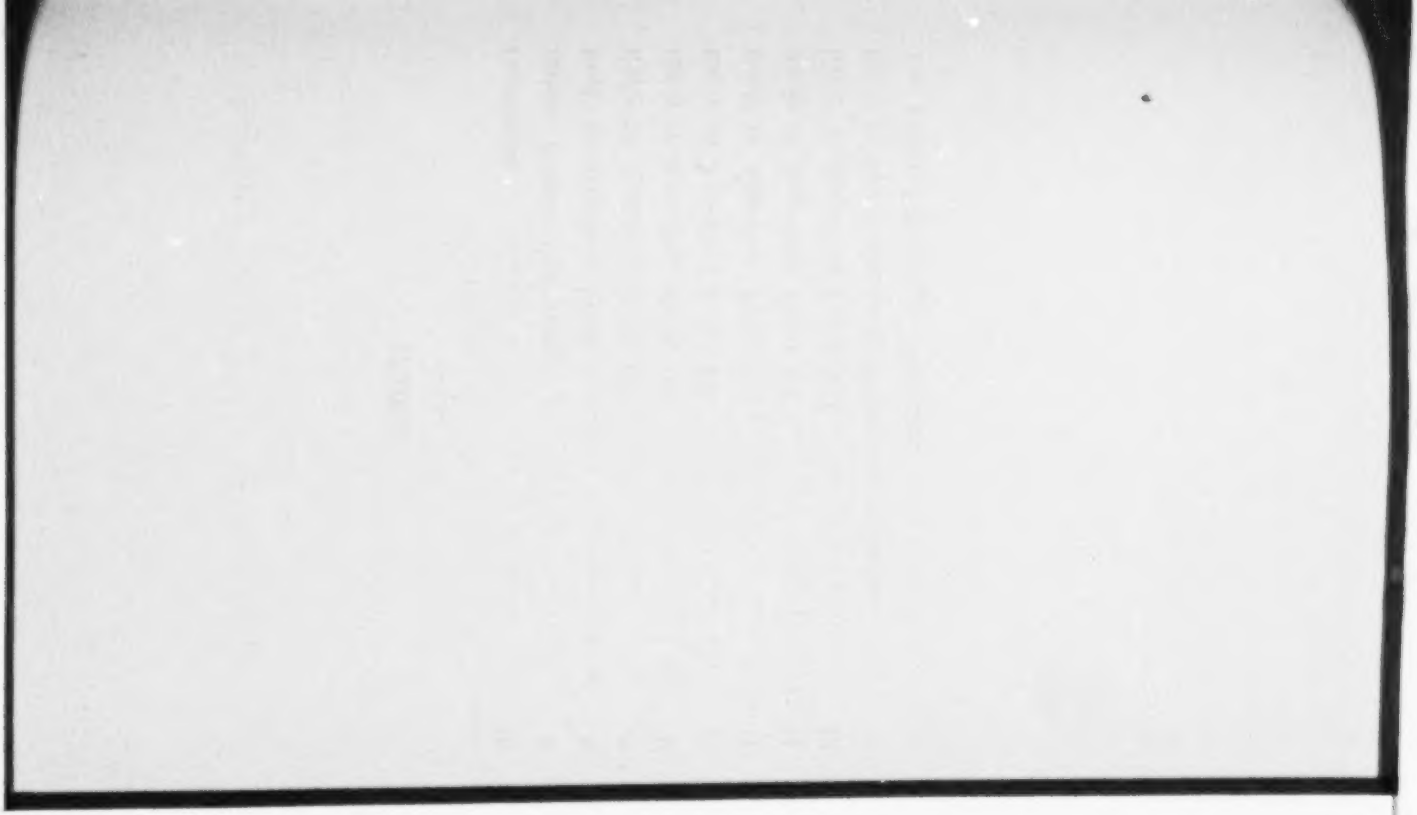

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MAY IT PLEASE THE COURT:

In this brief, appellant will follow as nearly as possible the order of appellees in their Statement Opposing Jurisdiction.

THE PRELIMINARY STATEMENT OF FACTS.

Although appellees seem to argue that no Federal questions are presented, they admit again and again that such questions were presented. On page 2 they say that appellant contended that because no clerk or sheriff was present at the time the medical commission conducted the inquest in the presence of the judge, she was denied due process

of law. They even quote from the amended petition, which challenged the proceedings on the ground that no court was in session, when the order in question was entered.

Counsel errs in two respects in saying this question was not mentioned again until the petition for rehearing, after the decision of the Illinois Supreme Court:

(1) Appellant challenged the authority of the county judge and the two commissioners to act, and the Illinois Supreme Court agreed with appellant on that point. This fact seems to have been overlooked by appellees, but the court said in its last opinion (383 Ill. 409, 418):

> "This court has held that a sheriff and clerk are essential to a court in order for it to exercise judicial powers. (*Witter* v. *Cook County Comrs.*, 256 Ill. 616.)"

This misconception of appellees appears again and again, as they blithely repeat that they have constantly contended that no clerk or sheriff was necessary to have a court. They have so contended, but not even the Illinois Supreme Court could go that far. Apparently counsel is not aware of the difficulty confronting the Illinois Supreme Court in affirming the judgment here appealed from. It had to twist the Lunacy Act into unrecognizable shape and say that it made the county judge a roving commissioner of the legislature to take testimony in a catch as catch can fashion outside of court and then take it into his court and formally approve his findings in the absence of the patient. This construction ignores the requirements of the Lunacy Act that the presence of the accused at the hearing is indispensable; that jurisdiction over lunacy inquests is vested only in the county court; and that the county judge may not exclude the court officials, the accused or her attorneys from the hearing. (Ill. Rev. Stat. Chap. 85, pars. 8, 13.) The appellees further say that we should have anticipated that the Illinois Supreme Court would have adopted the above construction of the act to avoid the rule of law that due process

of law requires a court proceeding, although it never occurred to appellees to make such an argument. Appellees are so entranced by the argument that no court was necessary that they have not bothered to read the court's last opinion.

(2) It is no objection to this court's jurisdiction that a question was raised on rehearing, if the question was injected by an unanticipated construction of a state statute. The argument that appellant should have anticipated this construction is absurd. Appellees say that we should have anticipated the construction, because appellant has lost a few battles along the way. We never anticipated a rehearing of a unanimous opinion, and we could not anticipate a construction that was not contended for.

Appellees run true to form when they assert that we have never contended that Mrs. Cash was not insane. In the next breath they accuse her of being sane and vengeful. The mental condition of appellant is immaterial, this being solely a question of jurisdiction. Appellant has constantly urged this in vain. (Appellant's Petition for Rehearing, p. 8, Rec. 87.) If she were insane, the flagrant disregard of the procedure for committing her was aggravated, because the alleged notice was then given to an insane person, and she was expected to ask for counsel and a jury trial and to ascertain that a court was properly convened and in session. As the Illinois Supreme Court said was the law in *Haines* v. *Cearlock*, 184 Ill. 96, at 97:

> "• • • The idea is too monstrous to be tolerated for a moment, that the legislature ever intended to establish a rule by which secret proceedings might be instituted against any member of the community, by any party who might be interested, to shut him up in a madhouse, by which he might be divested of his property and his liberty without an opportunity of a struggle on his part. Should such a principle be sustained, the most sane man in the State is liable to be

surprised at any moment by finding himself bereft of his property and on his way to a lunatic asylum. * * *"

That is precisely what happened to appellant, and the highest court of the state is still willing to concede that she has a right to a struggle. It refused to dismiss our appeal in the present proceeding, which stamps the procedure we followed as proper. It denied appellees' motion to dismiss the appeal made on the ground that a writ of *habeas corpus* had been denied, thus indicating that habeas corpus is simply a cumulative remedy. (Rec. 62.)

Appellees are insincere in their allegations that appellant intends to bring suits for false imprisonment, when her counsel have disavowed any such intention in open court and even offered a covenant not to sue the individuals involved in her commitment. The Metropolitan Trust Company, appellee, accepted the conservatorship after this case had once been to the Appellate Court, knowing that appellant challenged the validity of her commitment and of any appointment of a conservator based thereon, and of her intention to demand that her property be restored to her without deduction, and they are in no position to impugn anyone's motives. The conservator is not the one that has been imposed upon in this case. They used her money against her.

The right to a struggle is meaningless, unless appellant has the right to have her property restored to her without deductions for conservator's and attorneys' fees spent to defeat her own rights.

There Are in Fact Two Federal Questions.

There are in fact *two* federal questions in this case, and appellees have confused them. As stated above they point out that the question of due process of law was raised by the amended petition filed in the trial court. That was

soon enough to raise it, because it gave the trial court the opportunity to avoid error. This is the question that appellees say was waived by an appeal to the Appellate Court. Appellant anticipated this argument and cited authorities to show that it is not every constitutional question which will warrant a direct appeal, under Section 75 of the Civil Practice Act. (Ill. Rev. Stat. Chap. 110, par. 199.) (See Authorities cited under Paragraphs B and F of Jurisdictional Statement.) The Supreme Court of Illinois has construed that act as not including questions of judicial error, *i. e.*, where it is claimed that due process of law has been denied through failure of the court to follow the law. In this case, if the Lunacy Act had been followed, there would be no cause to complain. The denial of due process of law lies in the failure to follow the plain terms of the Lunacy Act, and thus to deprive appellant of her liberty and property. In such a case the appeal must go through the Appellate Court. The Supreme Court of Illinois did not refuse to consider the question as to the organization of the court on the ground that the question was not open, and did not consider the question as being waived. The Supreme Court mentions the Constitutional question by saying it was raised in the trial court. Clearly the *certiorari* question was preserved. Moreover, the Illinois Supreme Court in *Haines* v. *Cearlock*, 184 Ill. 96, 98-100, refused to entertain a direct review because only judicial error was involved under the Lunacy Act. That case also involved due process of law.

The question which gives this court jurisdiction on appeal was raised at the first opportunity by filing a petition for rehearing in the Supreme Court of Illinois wherein appellant challenged the construction placed upon the Lunacy Act by the court in its last opinion. This was an unanticipated construction, and the question was properly raised on petition for rehearing. *Herndon* v. *Georgia*, 295 U. S. 441; *Saunders* v. *Shaw*, 244 U. S. 317, 320.

Although a petition for *habeas corpus* was filed and denied, appellant was nevertheless released from custody by the institution a few days later. Evidently, the officers of Resthaven did not consider appellant to be insane.

The *habeas corpus* proceeding was filed to obtain appellant's release on the ground that she was sane when the petition for *habeas corpus* was filed. (Rec. 48.) The question of jurisdiction was not before the court. The petition recited that the present proceeding was pending on appeal. (Rec. 48, 56.) The issue presented was different and the *habeas corpus* proceeding is not *res judicata*.

The Florida proceedings would not be binding on the Illinois court in an original lunacy proceedings in Illinois, and a finding that appellant was insane by the Florida court would not waive the necessity of proceeding according to the statute in this state. This was not a suit on a foreign judgment and the Florida record was not mentioned in the County Court but was presented as evidence on appeal before the Circuit Court over the objection of the appellant.

On page 5, appellees state that our conclusions of fact are not supported by the record. No inaccuracy is pointed out and to avoid misstatement many of the facts were taken from the opinion of Justice Smith, who found that there was substance to appellant's charges that she had been brought into Kane County by fraud and duress.

Appellees assert that appellant had notice of the proceeding. As pointed out at length in the dissenting opinion, there was no order fixing the kind of notice to be given, as required by statute. The judge wrote on the back of the petition the words, "Give respondent at least 24 hours notice of hearing," and set the hearing for May 23, 1938 at *10:00 A. M.* Respondent was Libby Goll, the superintendent of Resthaven, and not the appellant. The State's Attorney wrote a letter to Mrs. Cash and notified her that the hearing would be at *2:00 o'clock* in the after-

noon. This letter was served on Resthaven Institution on May 21, 1938, by a constable, but was not delivered to Mrs. Cash until a few moments before the hearing. There was no order directing that kind of service to be made. Likewise there was no affidavit filed showing that appellant was unable to attend a hearing at the court house, as required by statute. (Ill. Rev. Stat. 1937, Chap. 85, par. 4.) On page 18 appellees say the statute requires that the hearing shall be in the presence of the patient, unless his or her mental and physical condition is such that it would be manifestly improper. They say: "This latter fact, if such be the case, must be established by an affidavit to that effect filed in the proceeding." Appellant has contended that such affidavit is necessary, and that its absence renders the hearing at Resthaven void. Appellees now seem to admit that an affidavit is necessary in this statutory proceeding, but they say that if it is filed the hearing may be held in the absence of the accused. Appellees are manifestly confused as to the function of the affidavit. In any event they make no attempt to explain its absence from the record. Section 8 of the Lunacy Act makes the presence of the accused indispensable, and "no proceedings can be had in his absence." (*Haines* v. *Cearlock*, 184 Ill. 96, 98, 99.) The hearing *must* be held at the court house, unless an affidavit is filed showing that the accused is unable to attend. It may be held away from the court house, if such affidavit is filed. (*Haines* v. *Cearlock*, 184 Ill. 96, 99.) No such affidavit was filed in this case. This proceeding is void for failure to give notice as directed by the judge, for failure to file an affidavit showing that Mrs. Cash was unable to attend a hearing at the court house, and for failure to conduct the hearing by a legally constituted court since no clerk or sheriff was present and no court ever convened.

ARGUMENT.

I.

The appellees contend that the federal question was not entertained or decided by the state court, and therefore, this court has no jurisdiction. The case of *Herndon* v. *State of Georgia*, 295 U. S. 441, cited by appellees under Point I, while stating that a federal question may not be raised after judgment by filing a petition for rehearing, also states the exception which is here applicable. That rule is subject to the exception that where the question first arose from the unanticipated act of the state court in giving to a statute a new construction, which threatens rights under the Federal Constitution, the first opportunity of raising the question being the petition for rehearing, then the federal question may be raised by such petition for rehearing. (*Saunders* v. *Shaw*, 244 U. S. 317, 320.) In the *Herndon case* the Georgia Supreme Court had previously placed the same construction upon the statute there involved, and so the decision appealed from could have been anticipated. Appellees' suggestion that appellant could have anticipated the construction placed upon the Lunacy Act by the Illinois Supere Court, even though they did not contend for it, is absurd, as long as *Haines v. Cearlock*, 184 Ill. 96 was unreversed.

In *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447, the Illinois Supreme Court had held that the constitutional questions had not been properly preserved under the Illinois practice. This court properly refused to review questions which had not been properly preserved according to local practice. The Illinois court did not re-

fuse to entertain the questions presented in the case at bar on procedural grounds.

In *New York* v. *Graves*, 300 U. S. 308, the appellant sought to argue a question as to the retroactivity of the statute, which he had not presented below in any form. These cases are not in point.

II.

Appellant's discussion of the *Herndon case* under Point I disposes of this point, where it is pointed out that a petition for rehearing is a proper method of raising a federal question, where the highest state court injects the question into the case by adopting an unanticipated construction of a statute.

III.

Appellees here concede that a federal question was raised in the state circuit court, but claim that it was waived by appealing to the Appellate Court. None of the Illinois courts held that it was not necessary to have a clerk or sheriff present in order to have a legal court. The Appellate Court ignored the contention, and the Supreme Court in its last opinion overruled appellees and affirmed the judgment for a reason not argued by either side.

Appellant anticipated appellee's argument under this point. (Parts B and F of Jurisdictional Statement.) Section 199 of the Civil Practice Act quoted by appellees has been construed by the Illinois Supreme Court not to include cases where it is contended only that the court erred in failing to follow the law, viz., judicial error. A reading of the cases there cited will readily demonstrate that this case would have been transferred to the Appellate Court, if a direct appeal had been taken, because at that time all that appellant could contend was that the Lunacy Act as

construed in *Haines* v. *Cearlock*, 184 Ill. 96, had not been followed in any substantial regard. As appellant has conceded, the Lunacy Act provides for due process of law; it is the administration of it as now sanctioned by the highest state court that denies the right to a hearing before a legally constituted court. Under the Illinois practice such questions are routed through the Appellate Court. *Haines* v. *Cearlock, supra,* is authority that a direct review will not lie in a lunacy case. There a writ of error to the circuit court was dismissed for want of jurisdiction. Now the practice is for the reviewing court to transfer the case to the proper court, instead of dismissing the action.

IV.

Appellees contend that the federal question is not substantial, because appellant is at liberty, though out of funds, and if she is given justice, it is suggested, that she will file suit for damages for false imprisonment. The substantiality of a question does not depend upon the motives of the litigants. Appellant contends that appellees are not at all concerned about suits for false imprisonment. The Metropolitan Trust Company is concerned only over its liability for dissipating appellant's property, if its particular conduct is not approved. Appellant has objected to the appellee conservator appearing against her in every court. (Rec. 17.) It has no right to oppose its ward. (*Mathews* v. *Sargent*, 175 Ill. App. 287, 289.) Now it pleads for sympathy and maligns its ward so that this court will give it the protection of a void order declaring appellant to be insane. This order formed the basis for the appointment of a conservator, which has never rendered ten cents worth of service to appellant, but has charged exorbitant fees for itself and its attorneys for opposing its ward in this proceeding. The Metropolitan Trust Com-

pany knew when it accepted the appointment that the authority of the court to declare Mrs. Cash insane had been challenged, but it nevertheless accepted the appointment and has dissipated appellant's estate upon the strength of it. A conservator which is conscious of its duty, would have declined the appointment or would have joined with the ward to protect her rights.

Appellant has been forced to employ her own counsel to obtain justice. The appelles have over $10,000 of appellant's money under their control which they are using against her.

The questions presented by this appeal have never been decided, and they are not so obviously untenable as to warrant the court in refusing to occupy its time with them. Every person in Illinois is subject to such treatment until this procedure is settled.

V.

This point is sound as far as it goes. An unreasonable or arbitrary construction of a state statute will not even be tolerated by this court, much less accepted by it. *American Railway Express Co.* v. *Kentucky,* 273 U. S. 259; *Booth* v. *Illinois,* 184 U. S. 425.

VI.

Appellees contend that the Lunacy Act as construed by the decision in this case affords appellant all guarantees of due process of law. The first answer to this broad claim is that the act as construed by the court bears no relation to the intention expressed by the legislature, and it does not afford equal protection of the laws. An arbitrary decision is not due process of law.

The Illinois court conceded that it was necessary to have the accused committed by a legally constituted court. That

is the only means of exercising judicial power. (*Haines* v. *Cearlock*, 184 Ill. 96, 99.) It evaded that rule by saying that the judge and his commission could meet anywhere and hear testimony and then convene court and adopt its findings. Aside from the fact that the suggested procedure was not even followed in this case, the construction of the highest state court overlooks the fact that the Lunacy Act says that the presence of the accused is indispensable, and she admittedly was never present in the court house of Kane County. She was not present when the judge entered the order in court, if court was ever convened. There is nothing in the act warranting such procedure, and lunacy proceedings are strictly statutory. Appellees take refuge in statements as to what the "ancient law" may have been. It is sufficient to say here that there is no "ancient law" in force in Illinois, in relation to lunatics, and county courts or county judges have no chancery power, except to enforce their limited jurisdiction. What counsel euphemistically calls "ancient practice" is simply a careless habit that has grown up among county judges without the sanction of the legislature.

In this point appellees point to the fact that no affidavit was filed showing that appellant was unable to attend court. They can derive no comfort from this deficiency in the record. We urged it as ground for reversal on rehearing in the Apellate Court and in the Supreme Court, but the Supreme Court said the point had been raised too late. Ordinarily in statutory proceedings, defects in the record cannot be waived, but as the dissenting justice points out the ordinary rules were not followed in this case.

Appellees err when they contend that if an affidavit is filed showing that the accused is unable to come to the court house, the hearing may be held in her absence. Section 8

of the statute plainly says that the presence of the patient "is indispensable" and no proceedings can be had in her absence. (*Haines* v. *Cearlock*, 184 Ill. 96, 99.) The only office of the affidavit is to give the court authority to *hold court* away from the county seat. There still must be a court, because the county court alone is vested with jurisdiction of lunacy proceedings. The individual who happens to be the judge has no judicial power.

VII.

Appellees' contention that the decision appealed from does not change the Illinois law and the decision should have been anticipated is based upon a failure to understand the last opinion of the Supreme Court of Illinois. We concede that the precise question was not presented in the case of *Haines* v. *Cearlock*, 184 Ill. 96, but the cases are analogous and the ringing denunciation of the failure to follow the Lunacy Act in that case led appellant to suppose that the case would be controlling. Counsel points out that nothing was said about the necessity of having the inquest before a court. That was implicit, because it has always been the law in this state that judicial power can only be exercised by legally constituted courts. The Illinois Supreme Court reaffirms that principle in the present case, but promptly disregards it. The absence of anyone authorized by law to conduct a hearing is just as fatal as the failure to give notice. The county judge was just as incompetent to hear this inquest as was the village idiot, because he is not vested with jurisdiction over lunacy proceedings. The jurisdiction is vested in the court over which he presides, and the clerk and sheriff are just as essential as is the judge, under Illinois law.

Conclusion.

So that the court will not deem this argument as being without substance, appellant points out the good sense of the policy adopted by the legislature and the utter nonsense of permitting the present type of proceedings. Court proceedings are designed so that public notice will be given of what goes on. Usually courts are held at a fixed place so that notice will be effective. The party who is brought before the court can tell by observation that he is in court. He sees the judge and court attendants, and is usually in a room that can easily be recognized as a court room. He hears the convening proclamation of the sheriff. He is put on notice that something is happening to him, and most citizens know enough to ask for counsel at once, or if a criminal case the court will appoint counsel.

In this case the judge and two doctors called on Mrs. Cash at Restnaven, just after she had had a wisdom tooth extracted. They sat down informally and asked her a few questions, while she spat blood. Doctors asking questions of a patient in a hospital would excite no curiosity, and if they mumbled the name of the judge, the patient would probably think he was another doctor. The individuals then departed, filed the papers at the clerk's office, and the patient was an adjudged lunatic. If an affidavit had been filed on which perjury could be assigned showing that the patient was unable to attend court, the court could be held away from the county seat. But the convening of court by the sheriff and the presence of the clerk with his docket and the swearing of witnesses would tell the patient at once that something judicial was going on and she could ask for her attorney, or if she were sufficiently informed, for a jury and a public hearing.

The very thing that the court inveighed against in *Haines* v. *Cearlock*, 184 Ill. 96, happened in this case. A

woman with all her faculties found herself suddenly bereft of her property and shut up in a madhouse without any pretense of following the Lunacy Act.

The appellees take isolated language from the opinion in *Haines* v. *Cearlock, supra,* and the last opinion in this case and endeavor to show that the two cases are consistent. The appellees omit rather pertinent language from their quotation of the *Haines case.* The court said, p. 99:

> "A court is a place where justice is administered judicially and the person authorized to administer justice in a judicial capacity must be present."

The opinion points out the necessity of an affidavit showing that the patient is unable to attend court, before it can be held elsewhere.

Appellees also overlook that their quotation from the *Haines case* says the presence of the patient is indispensable, while the decision here appealed does away with that requirement, because it does not require the presence of the patient when the judge convenes court and enters the order. Further, the court said in the *Haines case* that the statute contemplates a hearing, which necessitates the presence of the judge. Certainly he would have to be present, but the word "hearing" implied a court hearing, because that is necessary to due process of law and has been so held in Illinois from the beginning down to and including the present case. The present opinion plainly does away with the requirement that the judge be presiding in court when he exercises his judicial power, for the simple reason that the Supreme Court would create a commissioner out of the judge. The only commission authorized by the Act is a medical commission.

Finally, on page 21 appellees admit that the constitutional question has been in the case all along after the filing of the amended petition. We will admit that as to the *certiorari* question. We anticipated that the Supreme

Court would follow the plain terms of the Lunacy Act and reverse the judgment. The allowance on an appeal and the reversal of the judgment in the first opinion raised our hopes still further. We say that nobody could have anticipated what happened to us on rehearing.

PRAYER.

Appellant respectfully asks that the motion to dismiss or affirm be denied, but if this court is of the opinion that no federal question has been presented over which it has jurisdiction on appeal, then the papers filed herein be treated as a petition for the writ of *certiorari* and that the writ be awarded.

Respectfully submitted,

HENRY W. DIBRINGER,
WARREN H. ORR,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 619

HELEN CALHOUN CASH,

Appellant,

vs.

THE METROPOLITAN TRUST COMPANY AND THE PEOPLE OF THE STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

CHARLES G. SEIDEL,
IRVING B. CAMPBELL,
W. BEN MORGAN,
GEORGE BAYARD JONES,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 619

HELEN CALHOUN CASH,

Appellant,

vs.

THE METROPOLITAN TRUST COMPANY, CONSERVATOR, A CORPORATION; PEOPLE OF THE STATE OF ILLINOIS,

Appellees.

APPEAL FROM SUPREME COURT OF ILLINOIS.

APPELLEES' OPPOSING JURISDICTIONAL STATEMENT AND MOTION TO DISMISS APPEAL.

The appellees, believing that the matters set forth below will demonstrate that no federal question is fairly involved, the lack of substance in the questions raised by this appeal, and that if there were a federal question it was abandoned, file this their statement in opposition to appellant's statement as to jurisdiction.

Appellees include herein their motion to dismiss the appeal or in the alternative to affirm the judgment of the Supreme Court of Illinois on the ground that there is no

federal question involved and that the questions raised on behalf of appellant are so unsubstantial as not to need further argument, as appears from the face of this record.

The matters relied upon by appellees are more particularly stated below:

Preliminary Statement of the Case.

The appellant, Helen Calhoun Cash, was adjudged insane by an order entered in the County Court of Kane County, Illinois, on May 23, 1938. She was committed to Resthaven Sanitarium, an institution for the treatment of mental cases, located at Elgin, Illinois. No appeal was taken from that judgment. On September 1, 1938, after the expiration of the term at which the judgment was entered, appellant filed a petition in said County Court to vacate the judgment of insanity on the ground that she was not a resident of Kane County and had been brought into said County by fraud and duress. She charged that the judgment was void by reason of the fact that the court had no jurisdiction over her. The only other ground mentioned in the petition was that the petitioner was not a "reputable person" within the meaning of the statute. The petitioner was a nurse a Resthaven Sanitarium. No other grounds for vacating the judgment were alleged.

A full hearing was had before the County Court and her petition was denied. An appeal was taken to the Circuit Court of Kane County and a trial de novo was had according to the Illinois practice. The Circuit Court affirmed the decision of the County Court. An appeal was then taken to the Appellate Court of Illinois and the cause reversed and remanded to the Circuit Court for the reason that no briefs were filed by appellees. Appellant then amended her petition and included therein an additional point that no Clerk or Sheriff was present at the inquest into her sanity, and this additional ground is the founda-

tion for the asserted jurisdiction of this court. Appellant contended that because no Clerk or Sheriff was present at the time the medical commission conducted the inquest in the presence of the judge, she was denied due process of law. The amended petition raised that point in the following language (R. 80):

> "Petitioner further says that on or about the 23rd day of May, 1938, the County Judge of Kane County and the Assistant State's Attorney of Kane County appeared at the Resthaven Sanitarium accompanied by two doctors, and asked the petitioner many questions, but petitioner was not advised nor was she aware that a court proceeding was being held, that she was not asked if she desired counsel nor trial by jury. That there was no Clerk, Sheriff or Bailiff present, and that said proceeding was in violation of the Constitution of the United States and the Constitution of Illinois, concerning due process of law, and that because of said reasons the orders entered in said proceedings were null and void."

However, this constitutional question (which is the basis of this appeal) was not mentioned again until petition for rehearing, after the decision of the Illinois Supreme Court.

The People of the State of Illinois filed an answer averring that the proceedings had all been conducted according to law.

Another hearing was had before another Judge of the Circuit Court of Kane County and the judgment of the County Court was again affirmed and the amended petition denied. Appellant again prosecuted an appeal to the Appellate Court of Illinois where the judgment was affirmed. From there she appealed to the Supreme Court of Illinois and the judgment was again affirmed. The appeal to this Court is the last step in the series of proceedings to review the action of the County Court of Kane County denying the prayer of the petition.

In her petition and amended petition, appellant charged that she had been first imprisoned in the Stevens Hotel in Chicago, and taken from there by her sister and other persons to a sanitarium known as the Parkway Sanitarium, and from there to Resthaven Sanitarium at Elgin, Illinois, where she was confined for a period of time and denied access to attorneys and friends. She claimed that the County Judge conducted an informal hearing in the presence of two doctors without any advance notice of the hearing given to her and without any opportunity given to her to demand a jury or counsel.

It is significant to note that appellant never in any of her pleadings or arguments in the State courts claimed she was not actually insane at the time of the hearing. She remained in Resthaven Sanitarium for several months in 1938 after the commitment and was then released. She has not to our knowledge been confined in any institution whatever for at least five years past. She at one time in 1938 after her commitment instituted a habeas corpus proceeding in the Circuit Court of Kane County, Illinois, questioning the validity of her commitment, but after a full hearing was found to be legally committed and still insane, by another Circuit Judge. Shortly after that, she was released from the institution, but has never attempted to be declared restored to reason by court order.

The record shows conclusively that the appellant had been living in Florida prior to her coming to Illinois and had been adjudged insane by the County Court of Monroe County, Florida, on April 28, 1938. She was committed to an institution in that State. She summoned her sister, Dr. Henrietta Horner of Albany, New York, (R. 200) and a friend, Miss Keeler, from Chicago to come to her assistance. Her sister and her friend secured her release from the Florida authorities and brought her to Chicago. The record shows that many doctors and psychiatrists were

called in to examine her, some of which were of her own selection. It likewise shows that none of the allegations of her petition concerning fraud or duress were true. The transcript of the Florida proceedings show that appellant's insanity was acute and her propensities were dangerous. (See supplemental report of proceedings) The record shows that her closest relatives and friends were endeavoring at all times to do everything they could for her in the way of securing the best medical attention and the care which her condition required. It was necessary that someone should have her in a sufficient degree of control to prevent her dangerous propensities from resulting in injury to herself and the public. All the courts of Illinois have found that everything done by her sister, friends, sanitarium authorities or County officials was at all times proper and necessary due to her unfortunate condition, and were the things normally required of relatives and friends under the circumstances.

The opinion of the Supreme Court of Illinois recites these facts in some detail and we respectfully direct the attention of this Court to that opinion. It is sufficient to say at this point that the conclusions of fact contained in appellant's jurisdictional statement before this Court *are not supported by the record.*

The only point at issue was whether the County Court had jurisdiction over appellant so as to render a valid judgment. The question whether the statute had been followed in literal detail was beside the point. The issue was limited to the validity of the original judgment.

Appellant alleges in her jurisdictional statement that she was not advised that a legal proceeding was being held at the time she attended the inquest, and that she received no notice thereof. The record (pg. 7) however, shows that she was served with a statutory notice two days before the

holding of the inquest. In this connection the Illinois Supreme Court opinion says:

> "The record conclusively shows that appellant was given notice of the hearing two days prior to May 23. It is conclusively established that she was physically present in Kane County when notified and she was present at the inquest. No one doubts her physical presence in the County on May 19, when the petition for the inquiry was filed."

Appellant attempted to impeach this record on appeal by testifying that she received no notice of the hearing. When the Supreme Court of Illinois discusses the matter of verity of court records, it was referring to that point, that is, inasmuch as the record shows that notice had been served, it could not be impeached by appellant's oral testimony offered in another court at a later hearing. It must be remembered that appellant was an insane woman.

Appellant claims that she was given no opportunity to have a jury trial or counsel, but the record does not show she ever demanded either. The record does show, however, a complete and thorough hearing which lasted about two hours (R. 252). Both of the doctors on the commission testified that the patient was insane, suffering from manic-depressive psychosis and that she had delusions of persecution (R. 231-241). She admitted that Resthaven Sanitarium, the place where she was confined, was a "nice place" and never at any time gave any specific instance of unkind or harsh treatment by any person. There is absolutely no evidence that she was prevented from communicating with friends. The statement to that effect is unfounded, and it must be remembered that her relatives and friends—at least the only friends who have been revealed—were the very persons instrumental in placing her in the institution and who at all times knew where she was. She said that she wrote to her lawyer and he did not receive the

letter. That was hearsay and supposed to have occurred long after the inquest. Of course it could not affect what had gone before (R. 193).

The Illinois Lunacy Act provides for the appointment of a commission of two physicians practicing in the County to conduct the inquest. The commission holds an inquest and files a report with the Clerk of the Court, and then the Court enters an order based upon that report. The *Court* acts when the order is entered. This method of handling lunacy cases is apparently of anicent origin and fairly common in the practice of several States. A lunacy proceeding is not a proceeding according to common law and is generally referred to as a special statutory proceeding. The alleged insane person has the benefit of notice of the inquest, presence at the inquest, unless her physical condition is such as to make it manifestly improper, and an opportunity to rebut evidence of insanity. This, too, is almost universal in the practice of several States. In other words, there is nothing novel about Illinois procedure in such cases.

Appellant contends that the Illinois statute concerning lunacy inquests was not followed. However, the record shows that a petition was filed accompanied by the certificate of a practicing physician certifying that the patient was insane. A notice was duly given to the appellant. The County Judge appointed a commission of two practicing doctors who in his presence examined the patient and submitted a report in writing that she was insane which was duly filed in court and the order of insanity entered by the Judge.

The most that can be said on behalf of appellant is that the Lunacy Act, as appellant construes it, has not been in some points followed. However, no court has ever construed the Act as appellant does, and the Supreme Court of Illinois in this case has not overturned the law of Illinois,

as counsel for appellant would have us suppose. Moreover, errors in the course of the proceeding would not make the judgment void. In each of the courts where this case has been considered, the court construed the Lunacy Act to the effect that it is not necessary for the medical commission to conduct the inquest in the presence of the fully organized court; that the presence of the judge and the patient and the medical commission were all that were required. The decision of the Illinois Supreme Court went no farther than the decisions of the lower courts, so there was nothing in the opinion finally rendered to cause surprise.

As previously stated, appellant alleged in her amended petition in the Circuit Court that the proceedings were in violation of the Federal and State Constitutions with reference to due process of law. However, she waived this constitutional question by appealing to the Appellate Court of Illinois which has no jurisdiction of constitutional questions. The Illinois statute provides that appeals on constitutional questions must be taken direct to the State Supreme Court. The applicable statutory provision is as follows:

> "Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a construction of the Constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the State is interested as a party, or otherwise."
>
> Ill. Revised Statutes, Chap. 110, Sec. 199.

Under Illinois practice this appeal was a waiver of the constitutional question which she now seeks to revive.

The Illinois Lunacy Act further affords a person alleged to be insane a remedy of habeas corpus, either to determine the validity of her commitment or the question of recovery

from mental illness. The applicable provision of the statute is as follows:

> "Every person confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing, and if the judge shall decide that the person is insane such decision shall be no bar to the issuing of the writ a second time whenever it shall be alleged that such person has been restored to reason."
>
> Ill. Revised Statutes, Chap. 85, Sec. 24.

As previously pointed out, appellant availed herself of this remedy and the issue was resolved against her.

The case was tried and decided in the State courts of review upon the questions whether appellant was subject to the jurisdiction of the County Court of Kane County, and whether the *Illinois statute* required the Court Clerk and Sheriff to attend an inquest before a medical commission. Appellees contended that there was no fraud or duress and that the court had jurisdiction over her; also that no Clerk or Sheriff need attend the inquest. Each court decided for appellees, and the decision of the Supreme Court of Illinois was within the issues and should have been anticipated; it is what appellees urged the court to do, and what appellant resisted.

Propositions of Law and Authorities.

I.

The Federal question was not entertained or decided by the State court, and this Court has no jurisdiction to pass upon the case; it was decided upon non-federal grounds.

Herndon v. *Georgia*, 295 U. S. 441, 55 S. Ct. 794;

Pennsylvania Railroad Co. v. *Illinois Brick Co.*, 297 U. S. 447;

New York ex Rel. Cohn v. *Graves*, 300 U. S. 308.

II.

The Federal question was first raised in the State Supreme Court upon petition for rehearing, and came too late.

Rooker v. *Fidelity Trust Co.*, 261 U. S. 114;

Herndon v. *Georgia*, 295 U. S. 441, 55 S. Ct. 794;

Godchaux Company, Inc. v. *Estopinal, Sheriff, etc.*, 251 U. S. 179.

III.

The same Federal question was raised in the State Circuit Court, and waived by appealing to the State Appellate Court rather than appealing direct to the State Supreme Court.

Pennsylvania Railroad Co. v. *Illinois Brick Co.*, 297 U. S. 447;

Van Dyke v. *Illinois Commercial Men's Assn.*, 358 Ill. 458, 193 N. E. 490;

Illinois Revised Statutes, Ch. 110, Sec. 199, 218.

IV.

This Court will not entertain an appeal unless there is a substantial Federal question involved and there is none in this case.

Honeyman v. *Hanan*, 300 U. S. 14, 57 S. Ct. 350;

Mellon v. *O'Neil*, 275 U. S. 212, 48 S. Ct. 62.

V.

This Court will adopt the construction placed upon a State statute by the State Court.

Minnesota ex Rel. Pearson v. *Probate Court*, 309 U. S. 270;

Simon v. *Craft*, 182 U. S. 427.

VI.

The Illinois Lunacy Act as construed by the decision in this case affords appellant all guarantees of due process of law.

29 Am. Jur., pg. 663;
Dodge v. *Cole*, 97 Ill. 333;
Chaloner v. *Sherman*, 242 U. S. 455;
Simon v. *Craft*, 182 U. S. 427;
Hammon v. *Hill*, 228 Fed. 999;
Illinois Revised Statutes, ch.;
People v. *Gilbert*, 115 Ill. 59.

VII.

The decision in this case does not change the Illinois law and the construction given the statute should have been anticipated.

Herndon v. *Georgia*, 295 U. S. 441;
Haines v. *Cearlock*, 184 Ill. 96.

ARGUMENT.

I.

The Federal question was not entertained or decided by the State court, and this Court has no jurisdiction to pass upon the case; it was decided upon non-federal grounds.

Although the constitutional question which appellant now relies upon as giving this Court jurisdiction was raised in the amended special petition filed in the Circuit Court of Kane County, the case was tried and decided in the Appellate Court of Illinois and the Supreme Court of Illinois upon non-federal questions. There were several of these, but for present purposes it is sufficient to say that appellant contended in the State courts that the Illinois statute required the presence of the Court Clerk and Sheriff at the

inquest conducted by the Judge and medical commission, and appellees contended that under that statute the presence of the Clerk and Sheriff were not required.

The possibility that the State courts might construe the statute in accordance with appellees' theory was always present, but the point that the statute if thus construed would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States was first raised upon appellant's petition for rehearing which was filed in the Supreme Court of Illinois after the case had been heard and decided by that court. As argued under Point II, the proposition was raised too late.

The record in this case shows that the Supreme Court of Illinois did not pass upon any constitutional question in deciding the case, and did nothing more than deny the petition for rehearing. The State court, therefore, could not have erred in its decision of a federal question for the reason that it never entertained or considered a federal question.

New York ex Rel. Cohn v. *Graves*, 300 U. S. 308;

Pennsylvania Railroad Co. v. *Illinois Brick Co.*, 297 U. S. 447;

Herndon v. *Georgia*, 295 U. S. 441.

II.

The Federal question was first raised in the State Supreme Court upon petition for rehearing, and came too late.

Federal questions, constitutional or otherwise, must be timely and properly raised and put in issue as is required of non-federal questions. Moreover, they must be raised at the first opportunity.

Herndon v. *Georgia*, 295 U. S. 441.

The function of this Court is to review the action of the State court in passing upon federal questions. If no federal question was raised in the proper way and at the proper time so as to be passed upon by the State court and involved in its decision, then there is no federal question in the case which this Court can review.

Rooker v. *Fidelity Trust Co.*, 261 U. S. 114;

Godchaux Company, Inc. v. *Estopinal, Sheriff, etc.*, 251 U. S. 179.

As pointed out in the cases cited, the point raised by the petition for rehearing, where the federal question is not actually entertained and passed upon, comes too late for the reason that the case has already been decided upon the issues made by the litigants. A federal question does not become involved by the mere filing of a petition for rehearing. What is done after the case is decided cannot affect the decision already made.

III.

The same Federal question was raised in the State Circuit Court, and waived by appealing to the State Appellate Court rather than appealing direct to the State Supreme Court.

Appellant recognized the possibility of a federal question when the case was remanded to the Circuit Court of Kane County for the second trial. It was at that time that she sought and obtained leave to amend her special petition for the sole and only reason of making the additional point that the holding of the inquest by the Judge and medical commission in the absence of the Court Clerk and Sheriff resulted in a denial of due process under State and Federal Constitutions (R. 73). The pertinent para-

graph of the amended special petition is quoted in the preliminary statement at the beginning of this document. The point raised in the amended special petition is the same point which is made here. Plaintiff thus early recognized and relied upon the federal question. Even then it may not have been raised at the first opportunity, but at least it was not first thrust into the case at any later time.

Each of the three State courts which passed upon the amended special petition and the evidence taken thereon, held that under the Illinois statute it was not necessary for the Court Clerk or Sheriff to be present. The alleged federal question was, therefore, just as much involved in the decision of the Circuit Court and Appellate Court as in the decision of the State Supreme Court. They all construed the State statute the same way.

The question of due process of law which was thus raised in the Circuit Court of Kane County was necessarily involved in its decision. If appellant had chosen to assign error on this point she could have appealed directly to the Supreme Court of Illinois.

> "Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a construction of the Constitution is involved, and in cases in which the validity of a municipal ordinance is involved and in which the trial judge shall certify that in his opinion the public interest so requires, and in all cases relating to revenue, or in which the State is interested as a party, or otherwise."
>
> Ill. Revised Statutes, Chap. 110, Sec. 199.

The Illinois Supreme Court has held on numerous occasions that the taking of an appeal to the State Appellate Court rather than the Supreme Court constitutes a waiver

of the constitutional question and this Court has recognized and given effect to that practice.

Pennsylvania Railroad Co. v. *Illinois Brick Co.*, 297 U. S. 447;

Van Dyke v. *Illinois Commercial Men's Assn.*, 358 Ill. 458, 193 N. E. 490.

IV.

This Court will not entertain an appeal unless there is a substantial Federal question involved, and there is none in this case.

As previously pointed out in our statement of the case, the only issue raised in the original petition filed by appellant was whether or not the original judgment of the County Court was wholly void for want of jurisdiction. Questions of error could not be raised because no appeal was taken from the original judgment. She was trying to have the judgment set aside after the lapse of the term.

She did not even claim that she was improperly committed because she was not in fact insane. In other words, her objection was that she was committed by the wrong court. Later she also objected that the court was not properly constituted.

It has previously been pointed out that she has not been restrained of her liberty for more than five years past. Her actual liberty then is not involved in this proceeding. A conservator was appointed for her estate, which is not acting and one of the appellees in this case. At any time after the appellant recovered her sanity she could easily have been restored to her civil rights and her conservator discharged. Her conservator would, of course, be compelled to account to her for her property under the direction of the Probate Court which appointed it.

Therefore, it cannot be said that either the liberty or the property rights of the appellant are involved in this proceeding. She already has one, and she could easily have the other, if she is sane and capable of assuming the responsibility. The only reason why the appellant has so persistently carried on appeal after appeal in this litigation over a period of five years is that she still has those delusions of persecution which she had at the time she was originally found insane. She has turned upon her friends and relatives and is motivated entirely by a relentless determination to get revenge upon all of them for the imaginary wrongs done her. *She wants that original commitment in the sanitarium held void so that she can sue them all for false imprisonment.* We do not believe this a substantial federal ground with which to invoke the jurisdiction of this Court.

Appellant had also been found insane by the County Court of Monroe County, Florida, on April 28, 1938, which was less than a month before the inquest was held in Kane County, Illinois. The transcript of that proceeding appears in the supplemental report of proceedings following page 253 of the Record. It shows appellant to be insane and to have dangerous propensities. This judgment was not appealed from and is still in full force and effect and is entitled to full faith and credit.

Chaloner v. *Sherman,* 242 U. S. 455.

The Record also shows that appellant raised the issue of her sanity by habeas corpus proceedings in the Circuit Court of Kane County and that she was found to be insane, and that the commitment was valid. We have every reason, therefore, to believe that appellant was in fact insane and that no injustice has been done. The matter of her sanity, which is the real issue, has been inquired

into by several courts on various occasions; she has had adequate opportunity to be heard.

V.

This Court will adopt the construction placed upon a State statute by the State Court.

The interpretation and construction of a State statute is a non-federal question.

Minnesota ex rel. Pearson v. *Probate Court*, 309 U. S. 270;

Simon v. *Craft*, 182 U. S. 427.

The result is that this Court will adopt the view that the Illinois statute did not require the Court Clerk or Sheriff to be present at the inquest held by the County Judge and medical commission. That is the construction placed upon that statute by all the State courts—County Court, Circuit Court, Appellate Court and Supreme Court.

VI.

The Illinois Lunacy Act as construed by the decision in this case affords appellant all guarantees of due process of law.

The constitutional guarantee of due process requires notice and a hearing according to some regular procedure adapted to the nature of the case.

The procedure required by the Illinois statute is a direct outgrowth of the practice before the Chancellor in England whereby the State in its character of *parens patriae* conducted an inquiry into the mental condition of subjects of the Crown and exercised effective control over their persons and estate if they were found insane.

28 Am. Jur., pg. 663.

Dodge v. *Cole*, 97 Ill. 333.

The question of insanity was submitted to a commission under the ancient practice, which investigated the mental condition of the alleged insane person and made its report to the Chancellor, whereupon he entered the necessary order. The Illinois practice is substantially the same; the County Judge rather than the Chancellor appoints the commission, sits with it, and after the filing of its report with the Clerk of the Court, the Judge enters the necessary order. Surely a practice of such long standing must be considered as adapted to the nature of the case.

The Illinois statute requires notice to the alleged insane person and a hearing at which such person shall be present unless his or her mental and physical condition is such that it would be manifestly improper. This latter fact, if such be the case, must be established by an affidavit to that effect filed in the proceeding. It is thus apparent that the Illinois statute satisfies the requirements of due process of law as to notice and an opportunity to be heard.

Chaloner v. *Sherman*, 242 U. S. 455.
Simon v. *Craft*, 182 U. S. 427.

The Illinois statute further provides that repeated writs of habeas corpus may be sued out to inquire into the question of insanity or recovery of reason. In one case at least this ready remedy was held to bring the New York statute within the bounds of due process.

Hammon v. *Hill*, 228 Fed. 999.

The result is that under Illinois law the judgment of the County Court in a lunacy proceeding does not have such far-reaching consequences. It does not result in a judgment binding upon the alleged insane person upon principles of *res adjudicata*. The alleged insane person can file a petition for writ of habeas corpus in the Circuit Court forthwith and in that way obtain a full and complete re-

hearing of the question of insanity. The substantial result, therefore, is that no one can be denied his liberty or property under this statute without an opportunity to be heard.

People v. *Gilbert*, 115 Ill. 59.

VII.

The decision in this case does not change the Illinois law and the construction given the statute should have been anticipated.

Appellant contends that the decision of the Supreme Court of Illinois in this case is contrary to earlier decisions of that Court construing the Illinois statute, and that the Illinois law governing such proceedings (and upon which she relied) was revolutionized.

The precise point under consideration is whether the medical commission must conduct the inquest in the presence of a fully organized court rather than in the presence of the County Judge alone. This question had never been raised before in the reported decisions in Illinois and therefore appellant could not have relied upon any decision on that point by the Supreme Court of Illinois. The case of *Haines* v. *Cearlock*, 184 Ill. 96, which is pointed out by appellant as the case upon which she relied, and upon which she had a right to rely, did not decide that point. The question was not raised in that case.

At the time of the decision in *Haines* v. *Cearlock*, the Illinois statute did not expressly provide for the presence of the Judge at the inquest or for a notice to the alleged insane person. However, the Illinois Supreme Court said that the Illinois statute, by necessary implication, required notice to the alleged insane person and the presence of the Judge at the medical inquest. Nothing was said about conducting the inquest before a court or that it was necessary

for the Clerk of the Court and Sheriff to be present. In the course of the opinion the Court said:

> "The statute contemplates a hearing, which necessitates the presence of the Judge, and the presence of the patient is indispensable * * * If the Judge approves the finding he may enter an order, and the judgment entered is the judgment of the Court."

In the decision in the instant case the Court said:

> "The Lunacy Act authorizes the Judge to appoint a commission of physicians, who, in his presence, conduct the inquisition, make and file with the Clerk their report and findings as to the respondent's sanity, and upon that report the Judge pronounces his judicial order and the Clerk enters it of record."

The cases are therefore consistent. They both hold that the Judge should be present when the commission conducts the inquest, that the commission should file its report and findings with the Clerk of the Court and that the Judge thereupon enters an order which becomes the judgment of the Court. There is certainly nothing in *Haines* v. *Cearlock* to justify appellant in assuming that the Court had declared that the Court Clerk and Sheriff should also attend the inquest, and that their failure to do so would render the lunacy proceeding void.

There certainly was no ground for surprise, or reason that the decision of the Supreme Court of Illinois should not have been anticipated. *Haines* v. *Cearlock* was cited in each of the State courts which passed upon this case and each of those courts held that it was not essential to the validity of an inquest conducted by a medical commission that it take place in the presence of a fully organized court. These decisions of the lower courts should at least have suggested to appellant the possibility that she was misconstruing the Lunacy Act. We might even venture to say

the decisions of the lower courts at least raised a presumption that appellant's construction was wrong.

The fact that the constitutional question was raised by amending the petition in the Circuit Court demonstrates, to our way of thinking, that the decision of the Supreme Court of Illinois was actuallly anticipated at that time. Appellant saw, as she must have seen, that if the inquest had been conducted as required by the Illinois statute—that is, that no Clerk or Sheriff need be present—that the question whether such procedure conflicted with the due process clause of the Fourteenth Amendment to the Constitution of the United States was involved in the case.

Herndon v. *Georgia*, 295 U. S. 441.
Haines v. *Cearlock*, 184 Ill. 96.

The decision of the Supreme Court of Illinois was not different from the decisions of the lower courts. The constitutional question was just as readily apparent in the decisions of the lower courts and just as clearly involved, and there is no reasonable basis for the contention that the federal question first became apparent upon a reading of the opinion of the Supreme Court of Illinois filed in this case.

Neither is there any indication in the record of any discrimination against appellant. She has always felt that she was being persecuted and that is one of the symptoms of her illness. First it was her friends and relatives; then the County officials and now it is even the Supreme Court of Illinois which is supposed to be going out of its way to deny her rights which are accorded to other people similarly situated. There certainly is no indication in this record that the decision of the Illinois Supreme Court is arbitrary and capricious as appellant alleges or that there was any avoidance of a federal question or attempt to prevent appellant from seeking a remedy in this Court.

MOTION TO DISMISS.

WHEREFORE appellees respectfully submit this statement of matters and things making against the jurisdiction of this Court, showing that there is no federal question involved and showing also the unsubstantial character of the questions raised by the appellant, and appellees respectfully move the Court to dismiss this appeal, or in the alternative to affirm the decision of the Supreme Court of Illinois.

Respectfully submitted.

CHARLES G. SEIDEL,
State's Attorney, Kane County, Ill.;
IRVING B. CAMPBELL,
W. BEN MORGAN,
GEORGE BAYARD JONES,
Attorneys for Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 619

HELEN CALHOUN CASH,

Appellant,

vs.

THE METROPOLITAN TRUST COMPANY, CONSERVATOR, A CORPORATION; PEOPLE OF THE STATE OF ILLINOIS,

Appellees.

APPEAL FROM SUPREME COURT OF ILLINOIS No. 26738.

PETITION FOR REHEARING.

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THE METROPOLITAN TRUST COMPANY, CONSERVATOR, A CORPORATION; PEOPLE OF THE STATE OF ILLINOIS,

Appellees.

PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Now comes the Appellant, Helen Calhoun Cash, by her attorneys, Henry W. Dieringer and Warren H. Orr, and respectfully prays for a reconsideration by the Court of its Order of February 14, 1944, dismissing this cause for the want of a properly presented substantial Federal question.

The Appellant and her attorneys have carried this case to the highest court in the land for the sole purpose of preventing a repetition of the injustice done to Mrs. Cash in what was called a court proceeding in Illinois. Every person in Illinois is now in danger of being declared a lunatic in a "star chamber" proceeding just as Mrs. Cash was in this case. From the citations given as precedent for dismissing this cause, it becomes apparent that the Court has overlooked the contention of the Appellant from the

very beginning that no Court was ever in session when she was adjudged insane. The hearing took place in a private institution in the presence of the County Judge, but no Clerk, Bailiff or Sheriff were present; no Court was ever convened; no Court Reporter took down the proceedings; no guardian *ad litem* was appointed; the Appellant was not advised it was a Court proceeding, nor was she given an opportunity to employ counsel or call upon her friends; no opportunity was afforded for a trial by jury, nor was she advised that she was entitled to a jury trial. The Illinois Supreme Court in approving such a procedure had to upset the established law of Illinois, and in effect disregard the statutory provisions made for the protection of a person alleged to be insane. One of the outstanding requirements of the Illinois Statute is that no proceeding can be held away from the courthouse unless an affidavit is filed by someone, stating that the person alleged to be insane is unable to attend the regular session of the Court at the courthouse. No such affidavit was ever filed in this case, and this being a special statutory proceeding, the failure to file such an affidavit is fatal from the jurisdictional standpoint.

The Court's attention is called to the fact that we have consistently attacked the proceeding wherein Mrs. Cash was declared insane on the ground of lack of jurisdiction. This is purely a jurisdictional question and not an insanity matter. Due process of law, besides requiring notice and an opportunity to defend also requires that the case be tried before a judicial tribunal, see *Pennoyer* v. *Neff*, 95 U. S. 714 and *Powell* v. *Alabama*, 287 U. S. 45. This Court has never permitted the arbitrary and capricious exercise of power by persons whether they be Judges or otherwise when the Civil or Criminal rights of a person are encroached upon, see *American Railway Express Company* v. *Kentucky*, 273 U. S. 259, and *Booth* v. *Illinois*, 184 U. S.

425. We earnestly contend that if the present opinion of the Supreme Court of Illinois is permitted to stand, it will open the door for a vicious practice by making it a simple matter to "railroad" a person to an institution for mental patients. The effect of an order finding a person to be insane is to deprive him of his liberty for an indefinite period, and upon the strength of that order a conservator may be appointed, thereby depriving him of all his property. The worst criminal never finds himself in such a situation, the courts always protecting the defendant's rights.

In allowing the motion to dismiss this cause, this Court cited *Simons* v. *Craft*, 182 U. S. 427, 434-5. That case came up from Alabama, and was an attack upon a lunacy proceeding. Mrs. Simon, the incompetent, did not raise the question as to whether or not a Court had ever convened to hear her case; she had a guardian *ad litem* appointed, who filed an answer on her behalf; she was served a regular summons, issued out of a regular court; she did not allege that she was denied an opportunity to employ counsel, and she had a jury trial in a court convened in a courthouse. All of these facts are directly opposite to the case at bar. An examination of the pleadings in the case at bar will show that Mrs. Cash properly pleaded these points.

The Court also cites *Chalonery* v. *Sherman*, 242 U. S. 455, 459-60, as authority for granting the motion to dismiss. That case came up from New York and was a collateral attack by an adjudged incompetent person upon the order finding him incompetent. The defendant had notices of several motions served upon him personally, and made no effort to defend. He never questioned the jurisdiction of the court as to whether or not a court was actually in session, as in the case at bar. On page 462, this Court says:

> "If it be true that the orders ought to be set aside because they were, as alleged, entered corruptly, irregu-

larly or inadvertently, or because owing to a change in plaintiff's condition a committee is no longer required, the remedy must be sought by a direct proceeding to that end. No evidence was introduced to prove that even an attempt was made to vacate or modify the orders. In this action of Trover, which seeks merely damages for alleged wrongful withholding of plaintiff's property, the existing orders constitute a complete defense. The evidence offered was properly excluded and there was no error in directing verdict for the defendant."

This whole case turned on the fact that it was a collateral attack, whereas in the case at bar, the attack by Mrs. Cash was a direct proceeding.

The Court also cited *Milk Wagon Driver's Union* v. *Meadowmoor Company*, 312 U. S. 287, 294, which came up from Illinois, and was a case involving an injunction against picketing by a Labor Union. The page referred to contains a discussion by this Court as to when it will or will not reject a determination by a State Supreme Court, saying, "We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked." The Court goes on to say that no doubt Illinois can protect its people from violence. We agree with everything the Court says but maintain that the failure of the Illinois Supreme Court to follow the statute laid down by the people of the State of Illinois in the case at bar, is such a palpable evasion of the constitutional guarantee that every person is supposed to have, it is necessary that this Court interfere with such a decision and reject it for the protection of every person in Illinois.

The fourth case cited by this Court as authority for dismissing the case at bar is *Milwaukee Elevated Railway* v. *Milwaukee*, 252 U. S. 100, 106, which came up from Wisconsin and was a case concerning a street paving contract.

The reference to page 106 pertains to uniformity of decisions and states that the 14th amendment does not guarantee uniformity of decisions. That holding can be readily understood, and we have no quarrel with it, however when a Supreme Court or a Court of last resort holds other than it formerly did on the same question thus upsetting the established law and disregarding the doctrine of *stare decisis* the Court usually gives a reason for overruling the established law. In the case at bar, the Illinois Supreme Court upset a long line of decisions without giving any reasons, or even stating that they were overruled.

The Appellant urges that the cases cited by this Court as authority for dismissing this cause are not in point for the reasons pointed out above, and because of such reasons, and the importance and far-reaching effect of the Illinois Supreme Court's opinion (the importance of which is further proven by the fact that the Illinois Supreme Court first ruled unanimously for the Appellant herein, and two terms later reversed itself upon a petition for rehearing, Justice Smith dissenting at length), this Court is earnestly petitioned to give reconsideration to the decision in the above cause.

Respectfully submitted,

HENRY W. DIERINGER,
WARREN H. ORR,
Attorneys for Appellant.

CERTIFICATE.

I, HENRY W. DIERINGER, one of the attorneys for Appellant, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

HENRY W. DIERINGER,
Attorney for Appellant.

Dated: March 4th, 1944.

No. 619. CASH *v.* METROPOLITAN TRUST CO. ET AL. Appeal from the Supreme Court of Illinois. February 14, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a properly presented substantial federal question. (1) *Simon* v. *Craft*, 182 U. S. 427, 428, 434–5; *Chaloner* v. *Sherman*, 242 U. S. 455, 459–60; (2) *Milk Wagon Drivers' Union* v.

Meadowmoor Co., 312 U. S. 287, 294; (3) *Milwaukee Electric Ry. Co.* v. *Milwaukee*, 252 U. S. 100, 106. *Mr. Henry W. Dieringer* for appellant. *Mr. George Bayard Jones* for appellees. Reported below: 383 Ill. 409, 50 N. E. 2d 487.